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Introductory remarks

Dutch Insolvency law is regulated in the Dutch Insolvency Act 1896 (“DIA”, *Faillissementswet*). As will be explained below, the DIA contains three types of proceedings: (i) bankruptcy (*faillissement*), (ii) suspension of payments (*surseance van betaling*) and (iii) debt adjustment for natural persons (*schuldsanering natuurlijke personen*). In these proceedings insolvency office holders are appointed: a liquidator (*curator*) in bankruptcy proceedings, an administrator (*bewindvoerder*) in suspension of payments proceedings or debt adjustment for natural persons. The Netherlands is an EU Member State and therefore the EU Insolvency Regulation (1346/2000) is fully binding. The three proceedings mentioned are listed in Annex A to the Regulation, bankruptcy and debt adjustment for natural persons are listed in Annex B (and therefore are regarded as winding-up proceedings), whilst the three insolvency office holders mentioned are included in Annex C (and therefore are ‘liquidators’ within the terms of art. 2 (b) EIR). Judgments opening the proceedings mentioned as well as several insolvency related judgments are recognized automatically in the other EU Member States (apart from Denmark).

In November 2012, the Dutch Ministry of Security & Justice started a legislative programme aimed at amending and modernizing parts of Dutch insolvency law (legislative programme Recalibration Insolvency law (*Herijking Faillissementsrecht*)). The programme rests on three pillars: fraud prevention, strengthening the possibilities for rescue of viable businesses and modernization of proceedings. The programme provides for a series of separate legislative proposals, regarding: (i) directors’ disqualification; (ii) the adjustment of criminal insolvency law; (iii) the strengthening of the liquidator’s position; (iv) the ‘pre-pack’ sale (*Wet Continuïteit Ondernemingen I*); (v) pre-insolvency arrangements (*Wet Continuïteit Ondernemingen II*); (vi) measures facilitating the continuation of businesses in bankruptcy (*Wet Continuïteit Ondernemingen III*); and (vii) modernization of the bankruptcy procedure.

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

The DIA provides for three types of insolvency proceedings: (i) bankruptcy (*faillissement*), (ii) suspension of payments (*surseance van betaling*) and (iii) debt adjustment for natural persons (*schuldsanering natuurlijke personen*). As the latter is only available to natural persons (consumers and natural persons carrying on a business or practising an independent profession), it will not be further dealt with in this report.

Bankruptcy¹

Bankruptcy proceedings may be opened at the request of the debtor, one or more creditors or, in exceptional cases, the Public Prosecutor. The commencement of bankruptcy proceedings is generally described as implementing a general attachment on the debtor's assets for the benefit of his creditors. Bankruptcy proceedings are aimed at liquidation of the assets for the purpose of distributing the proceeds thereof among the creditors, according to their rank. However, in practice, bankruptcy proceedings serve as an important tool for the reorganization and continuation of businesses in financial distress, by way of a (sometimes pre-packed) sale of the insolvent debtor's business as a going concern. Notably, the transfer of (part of) the debtor's business in insolvency proceedings in principle does not trigger an automatic transfer of employment contracts. It should be noted that secured creditors can enforce their rights as if no bankruptcy proceeding had been opened.²

Bankruptcy proceedings may be opened by the court with respect to any debtor (i.e. natural persons or legal entities, regardless of whether the debtor carries on a business or practices and independent profession or not). In the opening judgment a liquidator (*curator*) is appointed. Bankruptcy proceedings are available to credit institutions and insurance companies, but special provisions apply.³ Bankruptcy proceedings can also be opened in respect of certain non-corporate entities, such as partnership (*maatschap*), limited partnership (*commanditaire vennootschap*) and commercial partnership (*vennootschap onder firma*).

Suspension of payments⁴

Suspension of payments proceedings can be described as a general deferment of payment of unsecured, non-preferential claims against an insolvent debtor. During the period for which suspension of payments has been granted, creditors of unsecured, non-preferential claims cannot take recourse against the debtor's assets. Preferential and secured claims are excluded from the proceedings and can be enforced on an individual basis as if the proceedings had not been opened.

The legislator's intention was that these proceedings should provide an instrument for the reorganization and continuation of (partially) viable businesses in financial distress. However, in practice it has never proven a satisfactory instrument and it is generally regarded as a first step towards the commencement of bankruptcy proceedings.

Suspension of payments proceedings can be commenced in respect of corporate entities and natural persons that carry on a business or practice and independent profession. In the opening judgment an administrator (*bewindvoerder*) is appointed. Credit institutions and insurance companies cannot apply for suspension of payments proceedings.⁵ Only the debtor may file for suspension of

¹ Bankruptcy is governed by art. 1-213kk DIA.

² Art. 57 et seq DIA.

³ Art. 212g et seq. and 213 et seq. DIA.

⁴ Suspension of payments is governed by art. 214-283 DIA.

⁵ Art. 214(4) DIA.

payments proceedings. Upon the debtor's request, suspension of payments is automatically but provisionally granted by the court. The creditors are consulted before a decision is taken on the continuation of suspension of payments proceedings. The maximum duration of suspension payments proceedings is one-and-a-half years, with the possibility of one or more extensions, each for a maximum period of one-and-a-half years.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

Special emergency proceedings (*noodregeling*) are available to credit institutions and insurance companies.⁶ These proceedings contain elements of both liquidation and reorganization proceedings. Only the Dutch Central Bank (*De Nederlandsche Bank*) can submit a request for the commencement of such emergency proceedings. Credit institutions cannot apply for suspension of payments proceedings – those are replaced by the emergency proceedings – but credit institutions and insurance companies can be subject to bankruptcy proceedings, in which case special provisions apply (see Question 1).⁷

Intervention Act (Financial Institutions (Special Measures) Act)

The Intervention Act provides the Dutch Central Bank (*De Nederlandsche Bank* or DNB) and the Minister of Finance new far-reaching powers to intervene in financial institutions in financial distress (*probleeminstelling*). DNB has the power to effectuate the transfer of (a part of) a bank or insurance company in financial distress.⁸ The Minister of Finance has the power to undertake immediate measures⁹ or disposes assets or shares in financial institutions in financial distress, including banks and insurance companies, to safeguard the stability of the financial system.¹⁰

No special proceedings exist regarding other specific types of (regulated) businesses.

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

In practice restructurings of businesses in financial distress often occur outside of formal insolvency proceedings. An out-of-court work out takes the form of a

⁶ Art. 3:160 et seq. Financial Supervision Act.

⁷ See *Wessels Insolventierecht I* 2012/1515 et seq.

⁸ Art. 3:159a-3:159ag Intervention Act. These powers exist outside the situation of the special emergency proceedings and bankruptcy and in the event these situations are applicable.

⁹ According to the explanatory memorandum, immediate measures can be taken in deviation of normal company legislation or the articles of association. The example is given of an approval right of holders of (priority) shares that could be suspended or rendered inoperative, as well as other protective or transfer restricting measures. See *Kamerstukken II* 2011/12, 33 059, nr. 3, p. 67.

¹⁰ Art. 6:1-6:13 Intervention Act.

multi-party contract and is subject to the general law of obligations, but not bound to any particular form requirements.¹¹ An out-of-court work out in principle requires the approval of each affected creditor. An advantage of such out-of-court workouts is that the commencement of any negotiations or its result are not published. A disadvantage under Dutch law is that creditors are not obliged to cooperate in informal restructurings. Creditors retain their right to take recourse against the debtor's assets or to petition for the commencement of insolvency proceedings. Creditors can reject the plan offered by the debtor, unless the rejection constitutes an abuse of power.¹² However, this is a doctrine that applies only in exceptional circumstances. The fact that the creditor is aware of the financial distress or an imminent bankruptcy and that the majority of the creditors is willing to accept the composition is insufficient to characterize his rejection as abuse of power.¹³ A rejection might be an abuse of power if the creditor did not act reasonably in voting against the proposed plan, which may, for example, be the case if the offer under the plan exceeded the anticipated distribution rate in bankruptcy proceedings.¹⁴

One of the intended legislative proposals of the Legislative programme Recalibration of insolvency law (*Herijking Faillissementsrecht*) aims to enhance out-of-court workouts (*Wet Continuïteit Ondernemingen II*) by providing for a cram down of a rescue plan on dissenting and non-voting creditors and shareholders if such a plan has been adopted by a (qualified) majority of affected creditors or shareholders (voting in classes) and has been sanctioned by the court.

4. What are the commencement criteria for insolvency procedures?

Suspension of payments

Suspension of payments can only be granted by the court at the request of the debtor. Creditors or the Public Prosecutor are thus not empowered to file for the commencement of suspension of payments proceedings.¹⁵ The court automatically and immediately grants a provisional suspension of payments to a debtor who submits a request. The condition for the commencement of suspension of payments proceedings is that the debtor anticipates that he will not be able to continue to meet his liabilities as they become due.¹⁶ The court will determine a date for hearing the creditors and may, following that hearing, proceed by granting the definitive suspension of payments, unless creditors representing more than 25% of the value of claims present at the hearing or 1/3

¹¹ Plans may, for example, offer partial payment of outstanding debts against the total discharge of the debtor or against the conferment of non-enforceable obligations.

¹² Art. 3:13 Dutch Civil Code.

¹³ Netherlands Supreme Court 12 August 2005, *NJ* 2006/230; *JOR* 2005/257 (*Groenemeijer/Directors Cast & Crew Payroll Services*). See *Wessels Insolventierecht VI* 2014/6201 et seq.

¹⁴ D. Faber en N. Vermunt, 'National report for the Netherlands', in: D. Faber, N. Vermunt e.a. (red.), *Commencement of insolvency proceedings*, New York: Oxford University Press 2012, p. 428-429. (Netherlands Report 2012).

¹⁵ In case of concurring requests for the commencement of bankruptcy proceedings and suspension of payments proceedings, the latter request must be considered first.

¹⁶ Art. 214(1) DIA.

of the number of creditors present at the meeting are against, or there is a well-founded suspicion that the debtor will prejudice the interests of creditors during the course of suspension of payments or if there is no prospect of the debtor being able to satisfy his creditors within a certain period of time.¹⁷ The maximum duration of suspension of payments proceedings is one-and-a-half years, with the possibility of one or more extensions, each for a maximum period of one-and-a-half-years.¹⁸

The right to request suspension of payments lies with the debtor's management board. No prior approval is required of the general meeting of shareholders or the supervisory board/non-executive directors. Only if the debtor is a large public or private limited company (*structuurvennootschap*), the supervisory board or the majority of non-executive directors must approve the request.¹⁹

Bankruptcy

Bankruptcy proceedings can be commenced by the court at the request of the debtor, one or more creditors or the Public Prosecutor.²⁰ In legal doctrine it is submitted that the debtor and a creditor can validly agree on a non-petition clause. Such clauses are binding and enforceable (depending on the scope of the clause). A petition submitted by the creditor in violation of the non-petition clause can therefore be rejected by the court, without any examination of the debtor's state of affairs.²¹ Even if there isn't a non-petition clause, a creditor can be barred from submitting a petition if this can characterize as abuse of power or is a violation of the general principle of good faith.²²

The condition for the commencement of bankruptcy proceedings is that the debtor has ceased to pay his debts, when they fall due, which, following case law of the Dutch Supreme Court, requires at least the existence of a plurality of creditors. If there isn't a plurality of creditors, the single creditor who has one or more claims left unpaid by the debtor, can only take individual recourse against the debtor's assets. If there is a plurality of creditors, it suffices that there is prima facie evidence of facts or circumstances that show that the debtor has ceased to pay his debts.²³ The court has relatively wide discretionary powers in examining whether this is the case.²⁴

In short, bankruptcy proceedings can be opened if there are two or more creditors and one or more matured claims have been left unpaid (irrespective of whether the claim of the petitioning creditor has matured). The mere existence of a claim of one other creditor is sufficient to support the petition for bankruptcy. If the bankruptcy petition is filed by a creditor, there must be prima facie evidence

¹⁷ Art. 218(2) and (4) DIA.

¹⁸ Art. 223 DIA.

¹⁹ Art. 2:164(1)/164a(4) c.q. 2:274(1)/274a(4) Dutch Civil Code.

²⁰ The Netherlands Supreme Court has explicitly held that the session in court falls within the scope of art. 6 of the European Convention of Human Rights, cf. Netherlands Supreme Court 20 May 1988, *NJ* 1989/676 (*Koster/Van Nie q.q.*).

²¹ Unless the petition is also submitted by another creditor who is not bound to a non-petition clause.

²² Netherlands Report 2012, p. 435.

²³ Art. 6(3) DIA.

²⁴ Netherlands Report 2012, p. 435-436.

of the existence of his claim against the debtor. Bankruptcy proceedings may even be opened if the debtor is unwilling to pay, not only in the case of his inability to pay.²⁵

If the debtor is a public limited company (*naamloze vennootschap*) or a private limited company (*besloten vennootschap*), the board of directors may only request the commencement of bankruptcy proceedings if it is instructed by the general meeting of shareholders to do so (unless otherwise provided by the articles of association).²⁶ If the debtor is a large public or private limited company (*structuurvennootschap*),²⁷ the supervisory board or the majority of the non-executive directors must approve the request of commencement of bankruptcy proceedings.²⁸

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

Proposals for restructuring plans can (outside insolvency proceedings in out-of-court workouts) only be presented by the debtor. The debtor is represented by the directors for this purpose (unless otherwise provided by the articles of association). Also during in-court proceedings, i.e. the suspension of payment or bankruptcy, restructuring plans (composition schemes) can only be proposed by the debtor, represented by the directors.²⁹

6. Please describe whether and to what extent shareholders' rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

Shareholders may be asked to provide additional capital, but they are not obligated to do so.³⁰ Under specific circumstances, however, shareholders may be personally liable in case of thin capitalization of the company. For liability it is required that the shareholder has contributed to the state of thin capitalization or even caused that state. In addition, the creditors of the company need to be

²⁵ Netherlands Report 2012, p. 436.

²⁶ Art. 2:136 c.q. art. 2:246 Dutch Civil Code.

²⁷ A company is a large company (*structuurvennootschap*) if it meets certain criteria established in art. 2:153(2)/264(2) Dutch Civil Code, namely (i) if according to the balance sheet with explanatory notes the sum of the issued capital of the company and its reserves amounts to at least 16 million euros; (ii) the company or a dependant company has, pursuant to a legal obligation, established a works council, and (iii) the companies and its dependent companies together normally employ a least one hundred employees in the Netherlands.

²⁸ Art. 2:164(1)/164a(4) c.q. art. 2:274(1)/274a(4) Dutch Civil Code.

²⁹ Art. 214(3) and art. 252 c.q. art. 138 DIA.

³⁰ Art. 2:64 c.q. 2:175 and 2:81 c.q. 2:192 Dutch Civil Code. T.J.H. Akkermans, *De informele reorganisatie van insolvente ondernemingen*, Tilburg: Celsus juridische uitgeverij 2009, p. 11.

prejudiced en this prejudice must be foreseen.³¹

In a situation where the business urgently needs new capital, an issuance of shares can be a possible solution. A majority shareholder can, however, prevent the issuance of shares, which can be a threat to the continuity of the business. The Enterprise Division of the Amsterdam Court of Appeal ('Enterprise Chamber') can by way of injunctive relief take measures (against shareholders) to make a restructuring possible or to save the business from bankruptcy (emergency funding).³² The power to do so only exists if there are compelling reasons in connection with the condition of the business or the interest of the investigation.³³ The Enterprise Chamber must achieve a fair balance, but the measures are not limited to the measures laid down in statutory Dutch company or private law.³⁴ Every measure of a provisional nature is allowed, even if the measure is an infringement of rights or legal relationships within the company.³⁵ The Enterprise Chamber can for example temporarily exclude the pre-emption rights of shareholders,³⁶ suspend the right to vote³⁷ or transfer shares to the trust of a third party.³⁸

II. Shareholders' Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

Bankruptcy

Bankruptcy proceedings can be commenced by the court at the request of the debtor, one or more creditors or the Public Prosecutor.³⁹ The notification of the initiation is dependent on the applicant(s) of the bankruptcy proceeding. If the debtor requests the commencement of bankruptcy and the debtor is a public limited company (*naamloze vennootschap*) or a private limited company (*besloten vennootschap*), the board of directors may only file for opening of such bankruptcy proceeding if it is instructed by the general meeting of shareholders to do so, unless otherwise provided by the articles of association.⁴⁰ The articles of

³¹ Netherlands Supreme Court 16 January 1987, *NJ* 1987/970. On the subject: Terng & I. Oosterhof, 'Onderkapitalisatie', *NJB* 2008/1385.

³² Art. 2:349a(2) Dutch Civil Code. See H.E. Boschma, 'Is de Flex-BV crisis-proof?', in: P. van Schilfgaarde et al. (eds), *Ondernemingsrecht in tijden van crisis*, Deventer: Kluwer 2014, p. 25 et seq.

³³ Netherlands Supreme Court 14 December 2007, *NJ* 2008/105 (*DSM*); Netherlands Supreme Court 25 February 2011, *NJ* 2011/335 (*Inter Access*).

³⁴ Art. 2:356 Dutch Civil Code.

³⁵ Netherlands Supreme Court 19 October 2001, *JOR* 2002/5 (*Skygate*); Netherlands Supreme Court 25 February 2011, *NJ* 2011/335 (*Inter Access*); Court of Appeal Amsterdam (Enterprise Chamber) 8 May 2014, *ECLI:NL:GHAMS:2014:1633* (*Delphi Bioscience*).

³⁶ Netherlands Supreme Court 25 February 2011, *NJ* 2011/335 (*Inter Access*).

³⁷ Court of Appeal Amsterdam (Enterprise Chamber) 8 August 2006, *JOR* 2006/264 (*Bonne Route*).

³⁸ Court of Appeal Amsterdam (Enterprise Chamber) 10 October 2006, *ARO* 2006/169 (*Pondac Products*).

³⁹ The Netherlands Supreme Court has explicitly held that the session in court falls within the scope of art. 6 of the European Convention of Human Rights. Netherlands Supreme Court 20 May 1988, *NJ* 1989/676 (*Koster/Van Nie q.q.*).

⁴⁰ Art. 2:136/2:246 Dutch Civil Code. See *Wessels Insolventierecht I* 2012/1226.

association normally also provide for such an instruction right for the general meeting of shareholders.⁴¹ The general meeting of shareholders decides autonomously on the request for the commencement of a bankruptcy proceeding and the management board is obliged to implement the resolution adopted by the general meeting of shareholders.⁴² Therefore, the shareholders are notified in the earlier steps of that process as the decision to file for bankruptcy cannot be taken by the board of directors without the consent of the general meeting. A resolution should be taken by the general meeting and the shareholders will be notified when such a general meeting of shareholders, with the objective of discussing the resolution to file for bankruptcy, is being convened by the board of directors and/or the supervisory board.⁴³

However, in large companies (*structuurvennootschappen*) the management board has the power to adopt a resolution with regard to the request of the commencement of a bankruptcy proceeding, although this resolution is subject to the consent of the supervisory board or the non-executive directors.⁴⁴

When bankruptcy proceedings are commenced by the court at the request of either one or more creditors or the Public Prosecutor, shareholders are not notified. They may only find out after the court orders the opening of the proceedings. The court order is registered in the court's bankruptcy register and the Central Insolvency Register (*Centraal Insolventie Register*)⁴⁵ and must be published in the online version of the Official Gazette (*Nederlandsche Staatscourant*). This publication will not take place at the same day the court orders the opening of the proceedings.⁴⁶

Suspension of Payments

Suspension of payments proceedings can only be opened by the court at the request of the debtor. Creditors or the Public Prosecutor are thus not empowered to file for the commencement of suspension of payments proceedings.⁴⁷ The court automatically and immediately grants a provisional suspension of payments to a debtor who submits a request. The right to request suspension of payments lies with the debtor's management board.⁴⁸ No prior approval is required of the general meeting of shareholders or the supervisory board/non-executive directors, unless otherwise provided by the articles of association.⁴⁹ Therefore, shareholders are in principle not notified of the initiation of a suspension of payments.

⁴¹ See *Wessels Insolventierecht I* 2012/1226.

⁴² See *Wessels Insolventierecht I* 2012/1226.

⁴³ Art. 2:109/219 Dutch Civil Code.

⁴⁴ Art. 2:164(1)(i)/164a(4) c.q. 2:274(1)(i)/274a(4) Dutch Civil Code. See *Wessels Insolventierecht I* 2012/1226.

⁴⁵ Art. 26 DIA. This online register is accessible free of charge and can be found at: <http://insolventies.rechtspraak.nl/>

⁴⁶ See I. Spinath, *Sdu Commentaar Insolventierecht 2011*, Commentary at art. 14 DIA Netherlands Report 2012, p. 444.

⁴⁷ In case of concurring requests for the commencement of bankruptcy proceedings and suspension of payments proceedings, the latter request must be considered first. See art. 218(d) DIA.

⁴⁸ See *Wessels Insolventierecht I* 2012/1227a.

⁴⁹ Netherlands Supreme Court 20 June 2008, NJ 2009/21 (*Willemsen/NOM*).

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

Shareholders are as such not classified as creditors within the framework of insolvency proceedings. They are thus not entitled to submit a claim arising from their shareholding for admission to the liquidator. Only in the exceptional case that the insolvent debtor is dissolved with a surplus value after the full discharge of all his creditors and the termination of the insolvency proceedings, the surplus will be distributed to the shareholders. Also, creditors who hold non-enforceable claims (e.g. non verified interests on monetary claims, see art. 128 DIA) need to be paid first before a distribution can be made to the shareholders.⁵⁰

If and to the extent that shareholders have acquired claims against the company, e.g. by extending loans or when the company has granted dividend to the shareholders prior to the commencement of the insolvency proceedings, they are treated as insolvency creditors. Therefore, they then compete for a distribution in accordance with the ranking of their claims, which are, in contrast with some other countries, not (automatically) subordinated to the insolvency claims of non-shareholders due to the dual capacity of these shareholders.⁵¹ If the shareholders want to share in the proceeds of the realisation of the debtor's assets, they must submit their claims in the claims verification procedure.⁵² Otherwise they will not be able to pursue payment.⁵³

9. Can shareholders continue to trade and transfer after the initiation of an insolvency proceeding affecting the company?

During the bankruptcy proceeding and the suspension of payments proceedings, the company remains in existence and therefore shareholders can continue to trade and transfer after the initiation of an insolvency proceeding.⁵⁴ However, there is a specific difference between the trade and transfer of shares of a public limited company (*naamloze vennootschap*) and a private limited company (*besloten vennootschap*). In case of a public limited company, the shares can either be registered or issued in bearer form. If the shares are issued in bearer form, shareholders can freely transfer and trade the shares.⁵⁵ When the shares are registered, the articles of association can provide for a transfer restriction of shares. If the articles of association provide for such a restriction, a shareholder needs either to offer the shares to the other shareholders, before he can offer the shares to an external interest party or needs the consent of the other current

⁵⁰ Netherlands Report 2012, p. 462. See also *Wessels Insolventierecht VII* 2013/7254a.

⁵¹ Netherlands Report 2012, p. 462.

⁵² Art. 26 DIA.

⁵³ *Wessels Insolventierecht V* 2010/5012 et seq. Netherlands Report 2012, p. 455.

⁵⁴ W.C.L. van der Grinten, E.J.J. van der Heijden, *Handboek voor de naamloze en de besloten vennootschap* (bewerkt door P.J. Dortmond (red.), Zwolle: W.E.J. Tjeenk Willink 2013, nr. 376 (Handbook Dortmond 2013).

⁵⁵ Art. 2:64 Dutch Civil Code.

shareholders to be able to offer his shares to external interested parties.⁵⁶ A general meeting of shareholders is to be convened in order to make such an offer to or receive the required consent of the other shareholders.⁵⁷

In case of a private limited company, the shares are registered.⁵⁸ Therefore, although unrelated to the insolvency of the company, the transfer of shares is restricted. The Dutch Civil Code prescribes that the shareholder of a private limited company offers his shares to the other current shareholders, unless explicitly provided otherwise by the articles of association.⁵⁹ A general meeting of shareholders is to be convened in order to make such an offer to the other shareholders.⁶⁰

10. Do shareholders have the right to request that a shareholders' meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The law applicable to corporate entities is codified in the second book of the Dutch Civil Code. Generally there has to be at least one shareholders' meeting per year.⁶¹ During suspension of payments proceedings the obligation to convene a shareholders' meeting remains in existence. It is likely the obligation remains in existence in bankruptcy proceedings as well.⁶²

The management and the supervisory board have the power to convene a shareholders' meeting. The articles of association may vest such power in other bodies.⁶³ Furthermore, if the management board and supervisory board fail to organize a shareholders' meeting which is required by the statute or the articles of association, every shareholder can be authorised by the court in interlocutory proceedings to convene a shareholder' meeting.⁶⁴ These powers to organise a shareholders' meeting continue to exist during suspension of payments proceedings and bankruptcy proceedings. The company in its legal form remains in existence, parallel to which the company bodies keep their corporate powers and remain in place as well.⁶⁵

However, there is no point in convening a shareholders' meeting during bankruptcy proceedings when there are no relevant points to discuss. In such circumstances, it can be argued that the shareholders' meeting can be omitted

⁵⁶ Art. 2:87 Dutch Civil Code.

⁵⁷ Handbook Dortmund 2013, nr. 376.

⁵⁸ Art. 2:175 (1) Dutch Civil Code.

⁵⁹ Art. 2:195 Dutch Civil Code.

⁶⁰ Handbook Dortmund 2013, nr. 376.

⁶¹ Art. 2:108/218 Dutch Civil Code.

⁶² S.C.J.J. Kortmann, *Het faillissement in de tijd van Molengraaff en nu*, Zwolle: W.E.J. Tjeenk Willink 1993, p. 146 (Kortmann 1993) and C.M. van der Heijden, *Insolventie en rechtspersoon*, PhD VU Amsterdam, Deventer: Kluwer 1996, p. 72. (Van der Heijden 1996)

⁶³ Art. 2:109/219 Dutch Civil Code.

⁶⁴ Art. 2:112/222 Dutch Civil Code. Van der Heijden 1996, p. 71.

⁶⁵ Bankruptcy: Kortmann 1993, p. 107. Suspension of payments: Kortmann 1993, p. 107 and 146 and Van der Heijden 1996, p. 72.

based on the principle of reasonableness and fairness.⁶⁶

Shareholders can also request the management board and the supervisory board/non-executive board members to convene a shareholders' meeting. One or more holders of shares that individually or jointly represent at least one per cent of the issued share capital of the company, may direct a written request to convene a general meeting, specifying the subjects to be considered to the management and the supervisory board. The management and the supervisory board – for that purpose equally authorized – should take the necessary measures in order to hold a meeting within four weeks after the request is being done, unless this conflicts with a substantial interest of the company. The articles of association can provide for a lower required amount of the issued capital and/or shorter period in which the meeting must be held. When the management and the supervisory board do not comply with the request, the shareholders can be authorised by the court in interlocutory proceedings to convene a shareholders' meeting.⁶⁷ The request for judicial authorisation will be granted by this court when applicant(s) briefly give evidence for the fulfilment of the aforementioned conditions and the applicants should have a reasonable interest in convening the shareholder' meeting. The request will be denied if the request for judicial authorization conflicts with a substantial interest of the company.

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company –if they remain in charge of the company –or vis-à-vis the insolvency representative?

In general, the shareholders' meeting has the right to request information concerning the company and its present and future business activities. The management board and the supervisory board have the obligation to provide the shareholders' meeting any required information, unless there is a compelling reason for the company not to do so.⁶⁸ This obligation remains in existence during bankruptcy proceedings and suspension of payments proceedings.⁶⁹ Every individual shareholder also has this right to request information.⁷⁰

However, during bankruptcy proceedings the information that this management board and supervisory board can provide does not entail information about the administration and settlement of the estate as the liquidator manages and settles the estate.⁷¹ During suspension of payments proceedings, the boards cannot

⁶⁶ Art. 2:8 (2) Dutch Civil Code. Van der Heijden 1996, p. 72.

⁶⁷ Art. 2:110/220 Dutch Civil Code.

⁶⁸ Art. 2:107(2)/217(2) Dutch Civil Code.

⁶⁹ Kortmann 1993, p. 129.

⁷⁰ H.M. Vletter – van Dort, 'Informatierechten van de aandeelhoudersvergadering', in: P. Van der Korst, R. Abma and G.T.M.J. Raaijmakers, *Handboek Onderneming en Aandeelhouder*, Deventer: Kluwer 2012, p. 212-3.

⁷¹ Kortmann 1993, p. 129; Van der Heijden 1996, p. 154.

provide information about the role and functioning of the administrator.⁷² In short, the directors of the company can provide information about the company during a reorganization procedure, but that information can not entail information about the administration and settlement of the estate during bankruptcy proceedings and about the role and functioning of the administrator during suspension of payments proceedings.

The shareholders do not have a right to request information vis-à-vis the liquidator in bankruptcy proceedings or the administrator in suspension of payments proceedings. However, liquidators and administrator have an obligation to file a report with the court registry on the progress of the insolvency proceedings every three months.⁷³ This report may in principle be consulted free of charge by all. This is not the case, *inter alia*, when the report entails confidential information.⁷⁴ The Dutch Insolvency Act does not contain provisions regarding the content of such report, but the *Recofa* guidelines for bankruptcy and suspension of payments proceedings provide for further regulation on the content of the report on the progress of the insolvency proceedings.⁷⁵

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

Generally it is the shareholders' meeting who has the authority to appoint and dismiss directors.⁷⁶ However, in large companies (*structuurvennootschappen*), the supervisory board or the non-executive directors have the power to appoint or dismiss directors.⁷⁷ During bankruptcy and suspension of payments proceedings this competent authority to appoint directors and to dismiss directors remains in existence.⁷⁸ The articles of association can provide the works council the power to of appoint a (non-executive) director.⁷⁹

With regard to the nomination of supervisory directors in large companies (*structuurvennootschappen*), both the shareholders' meeting and the works council have a right of recommendation.⁸⁰ The shareholders' meeting can transfer this authority to a shareholders' committee for a definite period of time to the maximum of two years.⁸¹ The supervisory board or the non-executive directors are not obliged to follow the recommendation of the shareholders' meeting. However, the shareholders' meeting can reject the nomination of a supervisory

⁷² Van der Heijden 1996, p. 154; Kortmann 1993, p. 129.

⁷³ Art. 73a (bankruptcy) and art. 227 (suspension of payments) DIA.

⁷⁴ Van der Heijden 1996, p. 37.

⁷⁵ Recofa-richtlijnen voor faillissementen en surseances van betaling, p. 7 and 8. *Recofa* stands for a working group of judges involved in insolvency cases, which issues guidelines to encourage uniformity in many aspects of the proceedings between the eleven first instance courts in the Netherlands.

⁷⁶ Art. 2:132/242 and art. 2:134/244 of the Dutch Civil Code.

⁷⁷ Art. 2:162/272 Dutch Civil Code. Kortmann 1993, p. 136.

⁷⁸ Kortmann 1993/1993, p. 137; Van der Heijden 1996, p. 141 and p. 143.

⁷⁹ District Court Amsterdam 29 August 2014, ECLI:NL:RBAMS:2014:5462.

⁸⁰ Art. 2:158/268(5) Dutch Civil Code.

⁸¹ Art. 2:158/268(10) jo (5) Dutch Civil Code.

board member or non-executive board member by an absolute majority of votes cast. This general meeting of shareholders must represent at least one third of the entire issued capital of the company. If the shareholders' meeting does not meet this requirement, but also does not support the nomination, a new shareholders' meeting can be convened. At that new shareholders' meeting, the nomination of a supervisory board member or non-executive board member can be rejected by an absolute majority of votes cast. In that case, the supervisory board or the non-executive directors nominate new candidates for the vacancy.⁸² We leave aside whether it is realistic to appoint a director during insolvency proceeding. It is noted though, that when in charge, any financial reward can only be paid with the approval (suspension of payment) of the liquidator or exclusively by him (in bankruptcy proceedings).

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders' meeting continues to exist during suspension of payments proceedings and bankruptcy proceedings. The company remains in existence, parallel to which the company bodies keep their corporate powers and remain in place as well. This also applies with regard to the special governance rights or powers of special categories of shareholders. For instance, the holders of priority shares will still have additional nomination rights with regard to management board members and supervisory board members or non-executive board members and the right of approval of an amendment of the articles of association and of the resolution to dissolve.⁸³ These additional governance rights will not be affected by the opening of an insolvency proceeding unless otherwise provided by the articles of association, as these rights do not have any effect on the assets, which are managed and settled as part of the estate by the liquidator.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

With regard to the first question, the type of insolvency proceeding does not affect the response. Shareholders can challenge decisions of the shareholder meeting by requesting a court to declare all or part of a disputed decision void or voidable.⁸⁴ A decision can be declared void if that decision is in conflict with the law of the articles of association. Furthermore, a decision of the shareholders' meeting (or other corporate body) is voidable if the (coming into effect of) the

⁸² Art. 2:158/268(9) Dutch Civil Code.

⁸³ See Handbook Dortmund 2013, nr. 188.

⁸⁴ Art. 2:14 Dutch Civil Code.

decision is (i) in conflict with statutory provisions or provisions contained in the articles of association that regulate the coming into effect of decisions; (ii) in conflict with the criteria/principles of reasonableness and fairness required by art. 2:8 Dutch Civil Code, and (iii) in conflict with the rules of procedure. These decisions can be declared void by the court within whose jurisdiction the company has its registered office (i) on the application against the company of a person that has a reasonable interest in the compliance with an obligation the company failed to fulfil; or (ii) on the application of the company itself. Therefore, the shareholder should thus have a reasonable interest in the compliance with an obligation the company failed to fulfil, e.g. the failure to decide in accordance with the principles of reasonableness and fairness. The decision might be disproportionately unfair against the shareholder.

With regard to the second question, the type of insolvency proceeding yet again does not affect the response. Shareholders retain the possibility of taking action against the acts of the directors. In case of a public limited company (*naamloze vennootschap*), decisions of the management board require approval of the shareholders' meeting when these relate to an important change in the identity or character of the company.⁸⁵ This is the case when a shareholder is going to supply capital in *de facto* another company.⁸⁶ However, this approval does not affect the authority of the management board to represent the company and therefore the lack of approval is not externally enforceable.

Shareholders can challenge acts of the board of directors by requesting a court to declare all or part of a disputed act void⁸⁷ or voidable⁸⁸. An act of the board (or other corporate body) is void if the act of the board of directors is in conflict with the law of the articles of association. Furthermore, such an act is voidable if the (coming into effect of) the decision is (i) in conflict with statutory provisions or provisions contained in the articles of association that regulate the coming into effect of decisions; (ii) in conflict with the criteria/principles of reasonableness and fairness required by art. 2:8 Dutch Civil Code, and (iii) in conflict with the rules of procedure. These acts can be declared void by the court within whose jurisdiction the company has its registered office (i) on the application against the company of a person that has a reasonable interest in the compliance with an obligation the company failed to fulfil; or (ii) on the application of the company itself. Therefore, the shareholder should thus have a reasonable interest in the compliance with an obligation the company failed to fulfil, e.g. the failure to decide in accordance with the principles of reasonableness and fairness. The act of the board of directors might be disproportionately unfair against the shareholder.

The Dutch Civil code provides for a special investigation of the affairs of companies in general and also for a special investigation of the affairs of an

⁸⁵ Art. 2:107a Dutch Civil Code. G. van Solinge en M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. De Naamloze en besloten vennootschap deel 2-II**, Deventer: Kluwer 2009, nr. 319-321. (Asser 2-II 2009)

⁸⁶ See Handbook Dortmund 2013, nr. 203.2.

⁸⁷ Art. 2:14 Dutch Civil Code.

⁸⁸ Art. 2:15 Dutch Civil Code.

insolvent company in the form of a right of inquiry.⁸⁹ The law on the right of inquiry provides for two clearly distinct procedures. The first procedure applies where the Enterprise Chamber is asked to order an inquiry into the conduct and policies of a company, and if it does so, this procedure ends at the time that the investigators appointed by the Enterprise Chamber file their report with the clerk of the Enterprise Chamber.⁹⁰ During this procedure the Enterprise Chamber also has the power to order provisional measures. The second procedure may be initiated only after the filing of the aforementioned report. The purpose of this second procedure is for the Enterprise Chamber to establish whether there has been misconduct on the basis of the report of the investigators and, if appropriate, to order measures after the inquiry.⁹¹ These measures are ordered by the Enterprise Chamber at the request of the initial applicant, others that meet the requirements of art. 2:346 or art. 2:347 Dutch Civil Code or the public prosecutor with the Court of Appeal in Amsterdam.⁹² The shareholders might have the right of inquiry (see below) and thus have the right to request for (provisional) measures. One of these (provisional) measures is the suspension or annulment of a resolution/act of the board of directors (or other corporate body).⁹³

With regard to the last question, the response differs with the kind of proceeding that is opened.

Bankruptcy

The insolvent company may, represented by the management board, take action against the acts of the liquidator. Although the liquidator has a monopoly on the powers regarding the management and settlement of the estate, the insolvent company can take action against the acts of the liquidator on the basis of the Dutch Insolvency Act (DIA). For instance, the board can, pursuant to art. 69 DIA, request the supervisory judge (*rechter-commissaris*) to order the liquidator to undertake certain acts or to refrain from certain acts. The company, represented by the board, can also request the court for the dismissal of the liquidator. The articles of association can give the shareholders' meeting of a private company the right to give specific instructions to the board.⁹⁴ This power could therefore be used to force the board to issue such a request for dismissal, but it can also be used to indirectly challenge the liquidator's acts and decisions via the board. In a public company, the right to give instructions can only apply to the general lines of the company's policy in areas that are specified in the articles.⁹⁵ Specific decisions and acts of the liquidator can therefore not be challenged indirectly in

⁸⁹ See Wessels *Insolventierecht IV* 2010/4427 et seq. Netherlands Report 2012, p. 462.

⁹⁰ M.W. Josephus Jitta, 'Procedural Aspects of the Right of Inquiry', in: M.W. Josephus Jitta e.a., *The Companies and Business Court from a comparative law perspective*, Uitgave vanwege het Instituut voor Ondernemingsrecht Rijksuniversiteit Groningen, deel 41, Deventer: Kluwer 2004, p. 8. (Josephus Jitta 2004)

⁹¹ Josephus Jitta 2004, p. 29.

⁹² Art. 2:355(1) Dutch Civil Code.

⁹³ Art. 2:349a(2) and art. 2:356(a) Dutch Civil Code respectively.

⁹⁴ Art. 2:239(4) jo. 2:189a Dutch Civil Code.

⁹⁵ Art. 2:129(4) jo. 2:78a Dutch Civil Code. There is some discussion about the scope of this provision.

this way in a public company. Another means of indirect influence is the shareholders' meeting's power to dismiss directors (see question 29) who are unwilling to request for the dismissal of the liquidator or who are unwilling to lodge a petition against acts of this liquidator, and appoint board members who will.

Suspension of payments

During the suspension of payments proceeding, the administrator (*bewindvoerder*) and the debtor are expected to jointly manage and settle the estate. If the shareholders of the company do not agree with the acts of the liquidator, they can, in case of a private company, instruct the management board to hinder these specific acts if the articles of association have provided for such a right to give specific instructions to the board. In the case of a public company, shareholders cannot challenge acts of the administrator. The company can reach a stalemate in such circumstances. To prevent such a stalemate, the court can take appropriate measures pursuant art. 225 DIA. It has been argued that the court could on this basis, for instance, enable the board to request the supervisory judge (*rechter-commissaris*), in analogy with art. 69 DIA, to order the administrator to undertake certain acts or to refrain from certain acts.⁹⁶ Here again, the shareholders may have the right to give specific instructions to the board and therefore force them to hand in such request. Another means of indirect influence is the shareholders' meeting's power to dismiss directors (see question 29) who are unwilling to hand in such a request and appoint board members who will.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

The Dutch Civil code provides for a special investigation of the affairs of companies in general and also for a special investigation of the affairs of an insolvent company in the form of a right of inquiry.⁹⁷ The law on the right of inquiry is laid down in Articles 2:344-359 Dutch Civil Code. The proceedings related to the right of inquiry are initiated before the Enterprise Chamber of the Court of Appeal in Amsterdam (hereinafter: Enterprise Chamber) by an application and not by a writ of summons.⁹⁸ The law on the right of inquiry provides for two clearly distinct procedures. The first procedure applies where the Enterprise Chamber is asked to order an inquiry into the conduct and policies of a company, and if it does so, this procedure ends at the time that the investigators appointed by the Enterprise Chamber file their report with the clerk of the Enterprise Chamber.⁹⁹ During this procedure the Enterprise Chamber also has the power to order provisional measures. The second procedure may be initiated only after the filing of the aforementioned report.

⁹⁶ Van der Heijden 1996, p. 70-1.

⁹⁷ See Wessels *Insolventierecht IV* 2010/4427 et seq. Netherlands Report 2012, p. 462.

⁹⁸ Josephus Jitta 2004, p. 7.

⁹⁹ Josephus Jitta 2004 p. 8.

The purpose of the first procedure is thus to get the Enterprise Chamber to order an inquiry into the conduct and policies of a company. This inquiry serves two main purposes. On the one hand, an inquiry may uncover certain facts and thereby contribute to transparency, thus giving the company and its stakeholders better insight and enabling them to redress certain situations themselves and on the other hand, the inquiry serves as the basis for a possible second procedure, in which the Enterprise Chamber may order specific measures ‘... in order that the company may be able to return to a proper track’.¹⁰⁰ The Enterprise Chamber may only order such an inquiry if there appear to be well-founded reasons to doubt the correctness of the conduct or the policies of a company.¹⁰¹ Both the internal functioning of the various corporate bodies and the manner in which the company conducts its business may be subject of an inquiry. Even individual shareholders may be subject of an inquiry. However, the procedure is always directed against the company.¹⁰²

The law on the right of inquiry grants the right to request for an inquiry to a number of distinct categories of applicants. One of those categories are shareholders of the company. The specific rules concerning the right to request for an inquiry are connected with the size of company. In case of a public limited company (*naamloze vennootschap*) or a private limited company (*besloten vennootschap*) with an issued capital not exceeding 22.5 million euros, one or more holders of shares or depositary receipts issued for shares, who individually or jointly represent at least 10% of the issued share capital of the company or who holds depositary receipts for shares with a nominal value of 225,000 euros or such lower amount as is provided in the articles of association of the company.¹⁰³ In the case of a public limited company (*naamloze vennootschap*) or a private limited company (*besloten vennootschap*) with an issued capital that exceeds 22.5 million euros, one or more holders of shares or depositary receipts issued for shares, who individually or jointly represent at least 1% of the issued share capital of the company or, when the shares or depositary receipts are admitted to trading on a regulated market or a multilateral trading facility, referred to in art. 1:1 of the Dutch Financial Supervisory Act or a system within a non-Member State that is comparable to a regulated market or a multilateral trading facility, or whose shares at least represent a market value of 20 million euros according to the closing price on the last day of trading before the request for an inquiry was initiated or such lower amount as is provided in the articles of association of the company.¹⁰⁴ Next to this option, the law on the right of inquiry also grants the right to request for an inquiry to shareholders if these shareholders are persons who are authorised to request for an inquiry by the articles of association of the company or under an agreement with the company.¹⁰⁵

¹⁰⁰ Josephus Jitta 2004, p. 9.

¹⁰¹ Art. 2:350(1) Dutch Civil Code. See Josephus Jitta 2004, p. 10.

¹⁰² Josephus Jitta 2004, p. 10.

¹⁰³ Art. 2:346(1) under b Dutch Civil Code.

¹⁰⁴ Art. 2:346(1) under c Dutch Civil Code.

¹⁰⁵ Art. 2:346(1) under e Dutch Civil Code. We leave aside that since 1 January 2013 also the liquidator has the right of inquiry, see art. 2:346(3) Dutch Civil Code.

However, it should be noted that the costs incurred are paid by the legal person. The exercise of the right to request for an inquiry will be more difficult if the shareholders themselves will be financially liable for the costs incurred of the inquiry.

16. Does the law provide for the establishment of a shareholders' committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

The Dutch Civil Code provides for the establishment of a shareholders' committee only in the case of large companies (*structuurvennootschappen*). This committee can be assigned the right of recommendation with regard to the appointment of a member of the supervisory board or a non-executive board director. This assignment is done by the shareholders' meeting for a definite period of time to the maximum of two years and can be terminated all times.¹⁰⁶ As the task is assigned by the shareholders' meeting, it will be the shareholders' meeting and not the liquidator that bears the related costs.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

During bankruptcy proceedings and suspension of payments proceedings, the company remains in existence and therefore shareholders can continue to trade and transfer shares.¹⁰⁷ However, there is a specific difference between the trade and transfer of shares of a public limited company (*naamloze vennootschap*) and a private limited company (*besloten vennootschap*). In case of a public limited company, the transfer of registered shares can be restricted if such restriction is provided for in the articles of association. A shareholder needs, pursuant to such transfer restriction, either to offer the shares to the other shareholders, before he can offer the shares to an external interest party or needs the consent of the other current shareholders to be able to offer his shares to external interested parties.¹⁰⁸ A general meeting of shareholders is to be convened in order to make such an offer to or receive the required consent of the other shareholders.¹⁰⁹ A shareholder cannot act in conflict with such transfer provision contained in the articles of association.

In case of a private limited company, the shares are registered.¹¹⁰ Therefore, the transfer of shares is restricted. The Dutch Civil Code prescribes that the shareholder of a private limited company offers his shares to the other current shareholders, unless explicitly provided otherwise by the articles of

¹⁰⁶ Art. 2:158/268(10) jo (5) Dutch Civil Code. See J. Winter, *P. van Schilfgaarde. Van de BV en de NV*, Kluwer: Deventer 2009, nr. 145. See Handbook Dortmund 2013, nr. 289.

¹⁰⁷ Handbook Dortmund 2013, nr. 376.

¹⁰⁸ Art. 2:87 Dutch Civil Code.

¹⁰⁹ Handbook Dortmund 2013, nr. 376.

¹¹⁰ Art. 2:175(1) Dutch Civil Code.

association.¹¹¹ A general meeting of shareholders is to be convened in order to make such an offer to the other shareholders.¹¹² Here again, a shareholder cannot act in conflict with such transfer provision contained in the articles of association.

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

The Dutch Civil Code nor the Dutch Insolvency Act provide for the possibility of assigning the outstanding shares of the company undergoing insolvency proceedings to a third party without the consent of the relevant shareholders. The right to transfer shares to a third party is reserved to the shareholders themselves as for instance is the case with a share-for-share merger. The transfer of shares for other shares or cash in return remains an issue between the shareholders of the target company/legal person and the shareholders of the acquiring legal person/company.

19. Can outstanding shares of the company undergoing insolvency proceeding be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

The Dutch Civil Code (art. 2:99-208) provides for multiple ways of reducing the issued capital. This can take place through a shareholders' resolution constituting the cancellation of shares or the reduction in the amount of shares. The shareholders' meeting is empowered to take such resolutions.¹¹³ The law restricts the categories of shares that are eligible for cancellation. The first category are shares or depositary receipts for shares that are held by the company itself. The second category are shares of which before the emission, pursuant to the articles of association, it was decided that they could be cancelled with repayment of the amount paid on the share. The last category are shares drawn for redemption of which before the emission, pursuant to the articles of association, it was decided that they could be drawn for redemption with repayment of the amount paid on the share.¹¹⁴

The cancellation only requires an amendment of the articles of association if the cancellation reduces the extent of the outstanding capital to under one fifth part

¹¹¹ Art. 2:195 Dutch Civil Code.

¹¹² See Handbook Dortmund 2013, nr. 376.

¹¹³ Art. 2:99(1)/208(1) Dutch Civil Code. See Van der Heijden 1996, p. 102.

¹¹⁴ Art. 2:99(2)/208(2) Dutch Civil Code. See Van der Heijden 1996, p. 102-3.

of the authorized capital.¹¹⁵ In short, the shares that might be eligible for cancellation or redemption will be repaid due to the statutory provisions. In short, the shares being held by the shareholders that are eligible for cancellation provides for the safeguard of repayment of the amount paid of the share. Next to this statutory safeguard, there is also the necessity for an amendment of the articles of association if the cancellation reduces the outstanding capital to a large extent and this amendment needs the consent of the shareholders' meeting.¹¹⁶

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?)

Art. 2:96a/206a Dutch Civil Code provides for a pre-emption right for current shareholders over new issues of shares in proportion to the value of their shares. This article, however, excludes shareholders with preferential rights.¹¹⁷ Moreover, the shareholders do not have such a pre-emptive right on shares that are issued for a consideration other than in cash, on shares that are issued to employees of the company¹¹⁸ and on shares with preferential rights.¹¹⁹ Finally, a court, and the Enterprise Chamber in the particular, can exclude the pre-emption rights of shareholders if the exercise of these pre-emption rights is not in accordance with the requirements of reasonableness and fairness.¹²⁰

These pre-emptive rights can be restricted or excluded through a resolution adopted by the shareholders' meeting. In the proposal for such a resolution, the reasons for the proposal and the reasons for the chosen course must be given. These pre-emptive rights can also be restricted or excluded by the corporate body to which the shareholders' meeting has delegated the power to issue new shares.¹²¹ Such a resolution must be adopted by a majority of at least two-thirds of the votes cast if less than half of the outstanding shares are represented.¹²² There are no special provisions concerning suppression of pre-emption rights if the company is insolvent. However, the right of placement of the shares is in case of a bankruptcy proceeding reserved for the liquidator, whilst the placement in suspension of payments proceedings needs to be done in cooperation with the administrator.¹²³

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company's assets have been transferred) even if the company was insolvent

¹¹⁵ Art. 2:67(4)/178(4) Dutch Civil Code. See Van der Heijden 1996, p. 102-3.

¹¹⁶ Art. 2:121/231 Dutch Civil Code.

¹¹⁷ Art. 2:96a/206a(2) Dutch Civil Code.

¹¹⁸ Art. 2:96a/206a(1) Dutch Civil Code.

¹¹⁹ Art. 2:96a/206a(3) Dutch Civil Code.

¹²⁰ Cf. Netherlands Supreme Court 25 February 2011, *NJ* 2011/335 (*Inter Access*).

¹²¹ Art. 2:96a/206a(5) Dutch Civil Code.

¹²² Art. 2:96a/206a(7) Dutch Civil Code.

¹²³ Van der Heijden, p. 105-6.

according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Bankruptcy proceedings may result in a sale of (part of) the insolvent company's business to a new entity in which existing shareholders may participate. An insolvent company may also propose a restructuring plan (composition, *akkoord*) to its creditors both in bankruptcy and in suspension of payments proceedings. The DIA suggests that such plan are essentially aimed at reducing or deferring the company's debts and does not affect the shareholders. In principle, therefore, shareholders retain their stake in the restructured company. In practice, however, restructuring plans will often seek to reflect the economic position of the shareholder by diluting or wiping out the existing stake in the company by issuing new shares within the framework of a debt-for-equity conversion, which under current Dutch law in principle requires the consent of the shareholders' meeting. Generally, existing shareholders may retain a share in the restructured company or its business if they put up corresponding value.

In addition, we note the following. The (viable) part of a company can continue in different ways and/or forms after the termination of insolvency proceedings. The company can for instance merge with another company through a legal merger or a share-for-share merger/corporate merger or the viable part of a company can continue after a division (split) of the insolvent company.

Legal merger

In principle, the Dutch Civil Code excludes the possibility for a merger when a company is in bankruptcy or suspension of payments proceedings.¹²⁴ If the company still decides to merge in bankruptcy proceedings, this decision can be declared void by the court on the application of a shareholder, the board of directors or everyone else with a reasonable interest.¹²⁵ This prohibition is focused on the execution of the deed of merger. However, the legislator also appreciates the opportunities a legal merger can raise for the continuation for the company and therefore the court can terminate the bankruptcy or suspension of payments proceedings just before the execution of the deed of legal merger. This must however coincide with the acceptance of an insolvency plan by the creditors and court approval of this insolvency plan. The process for the merger can therefore already start during the proceeding¹²⁶ and will take place after the termination of the bankruptcy or suspension of payments proceedings. This process, *inter alia*, consists of the approval of the merger by the shareholders' meeting of both the company that will cease to exist and the acquiring company. The same procedure applies to the suspension of payments proceeding. Here it is important for the management board to keep in contact with the administrator in order to terminate, through the acceptance of an insolvency plan, the suspension of payments proceedings and to accommodate the merger.

¹²⁴ Art. 2:310(6) Dutch Civil Code. See Van der Heijden 1996, p. 111.

¹²⁵ Art. 2:323 Dutch Civil Code.

¹²⁶ Van der Heijden 1996, p. 111.

A legal merger has three important consequences for the company and its shareholders, namely (i) all of the rights and obligations of the insolvent company are transferred to the acquiring company; (ii) with exception of the acquiring company, all other companies cease to exist¹²⁷; and (iii) the shareholders of the company or companies that cease to exist become, in principle, shareholder of the acquiring company.¹²⁸ Therefore, the shareholders can retain in principle a participation in the newly emerged company. However, if the company was insolvent according to a balance-sheet test, the value of the shares that will be held by the shareholders of the companies that cease to exist, will be minimal.

Share-for-share merger/corporate merger

The other two options of merging are the share-for-share merger and the corporate merger.

As a result of the share-for-share merger, the shareholders of the (insolvent) target company will receive cash or shares in the acquiring company for their shares in the (insolvent) target company.¹²⁹ In bankruptcy proceedings, the share-for-share merger does not occur in practice as the target company remains in bankruptcy after a share-for-share merger and therefore the authority to manage and settle the estate remains reserved to the liquidator. Therefore it is more interesting for the acquiring company to acquire the company's assets, i.e. to realise a corporate merger (see below).¹³⁰ A share-for-share merger can be prepared during the bankruptcy proceedings and be applied after the acceptance of the insolvency plan by the creditors and the court approval of this insolvency plan. The target company does not interfere in this process as it remains an issue between the shareholders of the target company and the shareholders of the acquiring legal company. However, *de facto* there will be an involvement of the management board of the target company as this management board will be involved in the pre-merger preparations. The liquidator will also be involved as the involved parties will also aim for the acceptance and court approval of the insolvency plan in order to terminate the bankruptcy proceedings. This also applies to the suspension of payments proceedings. Here, the administrator will also be involved in order to get the insolvency plan accepted and approved by the court.

A corporate merger implies the transfer of the company's business or part thereof to another company in return for cash or shares issued by the acquiring company. It can also be the case that two companies transfer their business or part thereof to a newly incorporated company. In practice, it will be the insolvent company that transfers (a part of) the company or part thereof company. There is an importance difference between the corporate merger and share-for-share merger. When the acquiring company issues shares in return for the assets, the shareholders' meeting will be involved, but this might not be the case when the acquiring company offers cash for the assets. A first view in the literature sees

¹²⁷ Art. 2:311(1) Dutch Civil Code. See Van der Heijden 1996, p. 110.

¹²⁸ Art. 2:311(1) Dutch Civil Code. See Van der Heijden 1996, p. 110.

¹²⁹ Van der Heijden 1996, p. 114.

¹³⁰ Van der Heijden 1996, p. 114.

this as a matter for the liquidator as it is just a way to settle the estate.¹³¹ Another view sees it still as matter for the shareholders' meeting to decide on or at least a matter for which the cooperation and the approval of the shareholders' meeting is necessary.¹³² In case of suspension of payments proceedings, the cooperation of the administrator is necessary to realise a corporate merger.¹³³

The last option for the continuation of a viable part of the company is the division of this viable part. There are two ways of division, namely (i) division by acquisition; and (ii) the division by the formation of new companies. When there is a division by acquisition, the estate – the compilation of rights and obligations – of the to be divided company are transferred to two newly incorporated acquiring under universal title (*overgang onder algemene titel*).¹³⁴ The company that is to be divided will cease to exist.¹³⁵ When there is a division by the formation of new companies, (a part of) the estate of one company passes over to the acquiring company. This acquiring company is owned by the dividing company that still exists.¹³⁶ The division does not only result in the passing over of the estate, but also in the incorporation of the acquiring legal person(s) and a change in the control structure of the acquiring company as the current shareholders of the dividing company become shareholders in the acquiring legal person(s).¹³⁷ The rights of the shareholders do not change so these shareholders retain a participation in the acquiring company or companies.¹³⁸

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (if there are separate reorganization and liquidation procedures, does this affect the response?)

The Dutch Insolvency Act nor the Dutch Civil Code contain provisions that affect the ranking of classes of shares and the preferential rights of classes of shares affected by the fact that the company is undergoing an insolvency process. Shareholders, without regard to the class, are not classified as creditors within the framework of insolvency proceedings. Therefore, they are not entitled to submit any claim arising from their shareholding for admission to the liquidator. Only in the exceptional case that the insolvent debtor is dissolved with a surplus value after the full discharge of all his creditors and the termination of the insolvency proceedings, the surplus will be distributed to the shareholders. Also, creditors who hold non-enforceable claims need to be paid first before a

¹³¹ Van der Heijden 1996, p. 115.

¹³² M.J.G.C. Raaijmakers, 'Preadvies', in: in: P.J. Dortmond & M.J.G.C. Raaijmakers, *De juridische fusie naar wordend recht* (Preadviezen Vereniging Handelsrecht), Zwolle: W. E. J. Tjeenk Willink 1980, p. 148.

¹³³ Van der Heijden 1996, p. 115.

¹³⁴ Art. 3:80(2) Dutch Civil Code. Due to the transfer under universal title, the acquiring company continues the comprehensive legal position of the target company, including the obligations of the target company.

¹³⁵ Art. 2:334a(2) Dutch Civil Code. See Van der Heijden 1996, p. 119.

¹³⁶ Art. 2:334(3) Dutch Civil Code. See Van der Heijden 1996, p. 119.

¹³⁷ Van der Heijden 1996, p. 119. The shareholders of the target company can also become shareholder of a group company of the acquiring company pursuant a three corner splitting (*driehoekssplitsing*). These shareholders will in that case not hold shares in the acquiring company.

¹³⁸ Art. 2:334o Dutch Civil Code.

distribution can be made to the shareholders.¹³⁹ If the insolvent debtor is dissolved with a surplus value after the full discharge of all his creditors, the preferential shareholders are paid first.

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

Shareholders can during the period prior to the commencement of an insolvency procedure, supply goods, services or financial resources to the company. As shareholders are not classified as creditors within the framework of insolvency proceedings, they are thus not entitled to submit any claim arising from their shareholding for admission to the liquidator. Only in the exceptional case that the insolvent debtor is dissolved with a surplus value after the full discharge of all his creditors and the termination of the insolvency proceedings, the surplus will be distributed to the shareholders. Also, creditors who hold claims which were existent but have not been verified during the verification process need to be paid first before a distribution can be made to the shareholders.¹⁴⁰ If there is a surplus value, the shareholders with preferential rights will be paid first.

If shareholders have acquired claims against the company, e.g. by extending loans or delivering goods or services, prior to the commencement of the insolvency proceedings, they are treated as (unsecured) insolvency creditors. Therefore, they then compete for a distribution in accordance with the ranking of their claims, which are, in contrast with some other countries, not (automatically) subordinated to the insolvency claims of non-shareholders due to the dual capacity of these shareholders.¹⁴¹ If the shareholders want to share in the proceeds of the realisation of the debtor's assets, they must submit their claims in the claims verification procedure. Otherwise they will not be able to pursue payment.¹⁴²

It is also possible for shareholders to supply goods, services and financial services during the insolvency proceeding, but then they would not have a ranking position as the capital is supplied after opening of the bankruptcy or suspension of payments proceeding.

¹³⁹ Netherlands Report 2012 2012, p. 462. See also Den Tonkelaar/Lennarts 2011, (T&C Burgelijk Wetboek), art. 2:23b BW, note 2.

¹⁴⁰ Netherlands Report 2012, p. 462. See also Den Tonkelaar/Lennarts 2011, (T&C Burgelijk Wetboek), art. 2:23b BW, note 2.

¹⁴¹ Netherlands Report 2012, p. 462.

¹⁴² *Wessels Insolventierecht V* 2014/5012 et seq. Netherlands Report 2012, p. 455.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (if there are separate reorganization and liquidation procedures, does this affect the response?)

Bankruptcy

Contracts that exist at the time of the commencement of bankruptcy proceedings are in principle not affected as contracts are not automatically terminated if one of the contracting parties is declared bankrupt.¹⁴³ A contract may, however, provide that it will automatically terminate or that rights are accelerated upon the commencement of bankruptcy proceedings. If only the bankrupt debtor has performed his obligations prior to the commencement of bankruptcy proceedings, the liquidator can demand performance from the counterparty on behalf of the insolvent estate in accordance with general rules of contract law.

There is no such duty to continue a contractual relationship, but when the contract does not provide that it will automatically terminate or that rights are accelerated upon the commencement of bankruptcy proceedings, the contractual relationship continues. If the contract contains such provisions, a performance is only required if the debtor has performed his obligations prior to the commencement of bankruptcy proceedings.

Suspension of payments

Contracts that exist at the time of the commencement of suspension of payment proceedings are in principle not affected as contracts are not automatically terminated if one of the contracting parties is granted suspension of payments.¹⁴⁴ A contract may, however, provide that it will automatically terminate or that rights are accelerated upon the commencement of suspension of payments proceedings. There is no such duty to continue a contractual relationship, but when the contract does not provide that it will automatically terminate or that rights are accelerated upon the commencement of bankruptcy proceedings, the contractual relationship continues.

¹⁴³ Art. 37 DIA. In Netherlands Report 2012, p. 473, Faber and Vermunt state that there are exceptions to this rule. These exceptions apply to the automatic termination of (for instance) a contract of mandate (*lastgeving*) pursuant to art. 7A:422 of the Dutch Civil Code and a partnership contract (*maatschapsovereenkomst*) pursuant to art. 7A:1683 (4) of the Dutch Civil Code. Similar rules govern limited partnership and commercial partnership contracts. These exceptions apply upon the opening proceedings against one of the contracting parties.

¹⁴⁴ In Netherlands Report 2012, p. 472, Faber and Vermunt state that there are exceptions to this rule. These exceptions apply to the automatic termination of (for instance) a contract of mandate (*lastgeving*) pursuant to art. 7A:422 of the Dutch Civil Code and a partnership contract (*maatschapsovereenkomst*) pursuant to art. 7A:1683 (4) of the Dutch Civil Code. Similar rules govern limited partnership and commercial partnership contracts. These exceptions apply upon the opening proceedings against one of the contracting parties.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors' meeting and vote on the insolvency plan without restrictions? (if there are separate reorganization and liquidation procedures, does this affect the response?)

If shareholders have acquired claims against the company, e.g. by extending loans, prior to the commencement of the insolvency proceedings, they are treated as insolvency creditors. Therefore, they then compete for a distribution in accordance with the ranking of their claims, which are, in contrast with some other countries, not (automatically) subordinated to the insolvency claims of non-shareholders due to the dual capacity of these shareholders.¹⁴⁵ If the shareholders want to share in the proceeds of the realisation of the debtor's assets, they must submit their claims in the claims verification procedure. Otherwise they will not be able to pursue payment.¹⁴⁶

In a bankruptcy proceeding, the bankruptcy judge sets a period within which the claims of creditors should be filed and a date, time and place for the creditors' meeting within 14 days after the opening judgment.¹⁴⁷ The liquidator must immediately notify the known creditors of the decisions of the bankruptcy judge.¹⁴⁸ The liquidator receives all the claims from the creditors and verifies the soundness of these claims through an audit of the debtor.¹⁴⁹ Also, the liquidator can call in the debtor and request him for information about the claim.¹⁵⁰ On the basis of his observations, the liquidator publishes a list of provisionally acknowledged claims and a separate list with contested claims¹⁵¹ after which the creditors' meeting can take place.¹⁵² Every creditor has the power to participate in the creditors' meeting. This meeting starts with the verification of the claims. The bankruptcy judge reads out both lists and every creditor can contest a claim on the list or support the contestation of a claim.¹⁵³ The claims that are not contested will be transferred to a new list of acknowledged creditors that is included in the official report.¹⁵⁴ Also, some claims will be granted conditional authorization by the bankruptcy judge.¹⁵⁵ These are the following claims: (i) claims of which the liquidator has demanded to be sworn in¹⁵⁶; (ii) claims that are being contested by the liquidator without any grounds for that decision or without a sound reasoning¹⁵⁷; (iii) claims that are under suspensive condition, when the liquidator and creditors cannot agree on the net present value¹⁵⁸; and

¹⁴⁵ Netherlands Report 2012, p. 462.

¹⁴⁶ *Wessels Insolventierecht V 2014/5012 et seq.* Netherlands Report 2012, p. 455.

¹⁴⁷ Art. 108 DIA. See *Wessels Insolventierecht V 2014/5052*.

¹⁴⁸ Art. 109 DIA. See *Wessels Insolventierecht V 2014/5053*.

¹⁴⁹ Art. 111 DIA. See *Wessels Insolventierecht V 2014/5065-6*.

¹⁵⁰ Art. 105 DIA. See *Wessels Insolventierecht V 2014/5065 e.v.*

¹⁵¹ Art. 112 DIA. See *Wessels Insolventierecht V 2014/5065, 5070 et seq.*

¹⁵² Art. 115 DIA. See *Wessels Insolventierecht V 2014/5065, 5075 et seq.*

¹⁵³ Art. 119(1) DIA. See *Wessels Insolventierecht V 2014/5082*.

¹⁵⁴ Art. 121(1) DIA. See *Wessels Insolventierecht V 2014/5104*.

¹⁵⁵ *Wessels Insolventierecht V 2014/5087*

¹⁵⁶ Art. 121(2) DIA. See *Wessels Insolventierecht V 2014/5109*.

¹⁵⁷ Art. 125 DIA. See *Wessels Insolventierecht V 2014/5183 et seq.*

¹⁵⁸ Art. 130(2) DIA. See *Wessels Insolventierecht V 2014/5119 et seq.*

(iv) recourse actions of solidary debtors if they can stand up for their own interests.¹⁵⁹ Only the creditors with definitively acknowledged claims or claims that are granted conditional authorization by the bankruptcy judge can vote on the insolvency plan without restrictions. The shareholders thus need to have such a claim to be eligible for voting on the insolvency plan. The same rules apply with regard to the creditors' meeting and its powers vis-à-vis the insolvency plan in a suspension of payments proceedings.¹⁶⁰

Noteworthy however is case law concerning the possibility of a shareholder to become part of the creditors' committee. The Court of Amsterdam found in the bankruptcy proceeding of *Agrenco Netherlands N.V.* that the interests of a shareholder as creditor are different from the interests of other creditors. This difference prevents a shareholder to become member of the creditors' committee as it could prevent the sound functioning of this committee.¹⁶¹

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors' meeting? If that is the case, what rights or duties do they have in that meeting? (if there are separate reorganization and liquidation procedures, does this affect the response?)

Only creditors have the power to participate in the creditors' meeting. Therefore, shareholders or companies of the same group must hold a credit claim against the insolvent company in order to be able to participate in the creditors' meeting. Without such a claim, participation is not possible.

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

In general, the shareholders' meeting has the right to request information regarding the company. The management board and the supervisory board have the obligation to provide the shareholders' meeting any required information, unless there is a compelling reason for the company not to do so.¹⁶² This obligation remains in existence during bankruptcy proceedings and suspension of payments proceedings. Every individual shareholder also has this right to request information.¹⁶³

Regarding the law of the right of inquiry, it is possible for a shareholder of the

¹⁵⁹ Art. 136(2) DIA. See *Wessels Insolventierecht V* 2014/5161.

¹⁶⁰ See *Wessels Insolventierecht V* 2014/8306 et seq.

¹⁶¹ District Court Amsterdam 12 January 2011 (Insolventienummer 10.839-F) (*Agrenco Netherlands N.V.*). See R.J. de Weijs, 'Nieuwe regels omtrent aandeelhoudersleningen: tussen afdwingbaarheid en onrechtmatigheid in', *Preadvies NVR II* 13 november 2013 (forthcoming).

¹⁶² Art. 2:107(2)/217(2) Dutch Civil Code.

¹⁶³ H.M. Vletter – van Dort, 'Informatierechten van de aandeelhoudersvergadering', in: P. Van der Korst, R. Abma and G.T.M.J. Raaijmakers, *Handboek Onderneming en Aandeelhouder*, Deventer: Kluwer 2012, p. 212-3.

parent to have a special investigation in the subsidiary.¹⁶⁴ However, it remains debated whether shareholders of the subsidiary can have an inquiry in the parent company or other subsidiaries.¹⁶⁵ As the information rights concern the company the shareholder has shares in, this does not mean the shareholders also have information rights with regard to the parent or other related companies and therefore he has no information rights as to the filing of insolvency proceedings.

III. The Role of the Shareholders' Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders' meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The law applicable to corporate entities is codified in the second book of the Dutch Civil Code. Generally there has to be at least one shareholders' meeting per year.¹⁶⁶ During suspension of payments proceedings the obligation to convene a shareholders' meeting remains in existence. It is likely the obligation remains in existence in bankruptcy proceedings as well.¹⁶⁷

The management and the supervisory board have the power to convene a general meeting. However the articles may vest such power in other bodies.¹⁶⁸ These powers to organise a shareholders' meeting continue to exist during suspension of payments proceedings and bankruptcy proceedings. The company remains in existence, parallel to which the company bodies keep their corporate powers and remain in place as well.¹⁶⁹ The powers of the corporate bodies are restricted by insolvency law, pursuant to which in suspension of payments actions concerning the administration or disposal of the company's assets require the consent of the administrator ¹⁷⁰ and in bankruptcy proceedings the liquidator has the exclusive power to administer and dispose of the company's assets.¹⁷¹

However, there is no point in convening a shareholders' meeting during bankruptcy proceedings when there are no relevant points to discuss. In such circumstances, it can be argued that the shareholders' meeting can be omitted based on the principle of reasonableness and fairness.¹⁷²

The administrator in suspension of payments proceedings and the liquidator in

¹⁶⁴ Court of Appeal Amsterdam (Enterprise Chamber) 27 April 2000, *JOR* 2000/127 (*Bot Bouw Groep*).

¹⁶⁵ S.M. Bartman & A.F.M. Dorresteyn, *Van het concern*, Deventer: Kluwer 2013, p. 348; Asser 2-II 2009, nr. 740; Court of Appeal Amsterdam (Enterprise Chamber) 5 October 2005, *JOR* 2005/296 (*Smit Transformatoren*).

¹⁶⁶ Art. 2:108/218 Dutch Civil Code.

¹⁶⁷ Kortmann 1993, p. 146; Van der Heijden 1996, p. 72.

¹⁶⁸ Art. 2:109/219 Dutch Civil Code.

¹⁶⁹ Bankruptcy: Kortmann 1993, p. 107. Suspension of payments: Kortmann 1993, p. 107 and p. 146 and Van der Heijden 1996, p. 72.

¹⁷⁰ Art. 228 DIA.

¹⁷¹ Art. 23 and art. 68 DIA.

¹⁷² Art. 2:8(2) Dutch Civil Code. Van der Heijden 1996, p. 72.

bankruptcy proceedings do not have the corporate power to convene a shareholders' meeting and are dependent on the company bodies to convene a meeting.¹⁷³

The liquidator in bankruptcy proceedings is, within the scope of management of the assets of the bankrupt company, empowered to exercise the rights that are connected to the shares the bankrupt company holds in a subsidiary.¹⁷⁴ Furthermore, the liquidator in bankruptcy proceedings is empowered to request for inquiry proceedings at the Enterprise Chamber of the Amsterdam Court of Appeal if he wants to clarify the causes and background of the bankruptcy.¹⁷⁵

29. Does the shareholders' meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders' meeting generally has the following core competences:

1. The authority to appoint and dismiss directors.¹⁷⁶ Except in large companies when the power to appoint and dismiss lies with the supervisory board (two-tier board) or the non-executive directors (one-tier board);¹⁷⁷
2. The authority to appoint at least two third of the supervisory board () and to dismiss them.¹⁷⁸ However, the articles of association may provide that one or more members of the supervisory board, not exceeding one-third of the total number, shall be appointed otherwise than by the shareholders' meeting;¹⁷⁹
3. The authority to amend the articles of association;¹⁸⁰
4. The authority to adopt the annual accounts of the company;¹⁸¹
5. The authority to wind up the company;¹⁸²
6. The authority to convert the company;¹⁸³
7. The authority to decide on a resolution to merge;¹⁸⁴
8. The authority to adopt a resolution for division of the company;¹⁸⁵
9. The power to request the management and supervisory board for information, which they should provide unless this conflicts with a substantial interest of the company;¹⁸⁶
10. Any powers not conferred upon the management or other persons shall be vested in the general meeting.¹⁸⁷

¹⁷³ Suspension of payments: Kortmann 1993, p. 115. Bankruptcy: Van der Heijden 1996, p. 72.

¹⁷⁴ ECLI:HR:2008: BG1117 (*Air Holland*).

¹⁷⁵ Art. 2:346 Dutch Civil Code.

¹⁷⁶ Art. 2:132/242 Dutch Civil Code and art. 2:134/244 Dutch Civil Code.

¹⁷⁷ Art. 2:162/164a(2) and 272/274a(2) Dutch Civil Code.

¹⁷⁸ Art. 2:142/143 and art. 2:252/253 Dutch Civil Code and art. 2:144/254 Dutch Civil Code.

¹⁷⁹ Art. 2:143/253 Dutch Civil Code.

¹⁸⁰ Art. 2:121/231 Dutch Civil Code.

¹⁸¹ Art. 2:101/210(3) Dutch Civil Code.

¹⁸² Art. 2:19(1)(b) Dutch Civil Code.

¹⁸³ Art. 2:18(2)(a) Dutch Civil Code.

¹⁸⁴ Art. 2:317 Dutch Civil Code.

¹⁸⁵ Art. 2:334m(1) and (3) Dutch Civil Code.

¹⁸⁶ Art. 2:107/217(2) Dutch Civil Code.

¹⁸⁷ Art. 2:107/217 Dutch Civil Code.

In case of a public limited company, decisions of the management board require approval of the shareholders' meeting when these relate to an important change in the identity or character of the company.¹⁸⁸

Suspension of payments

It is generally assumed that the shareholders' meeting remains in existence during suspension of payments proceedings.¹⁸⁹ However, decisions of the shareholders' meeting regarding the company's assets need to be confirmed by the administrator to be effective.¹⁹⁰ Thus, the shareholders' meeting preserves all its powers concerning decisions which are of a corporate nature.

Bankruptcy

In case of bankruptcy of a company generally the shareholders' meeting retains all of its powers.¹⁹¹ However the shareholders' meeting does not have the power to decide on matters that affect the company's assets. This power resides with the liquidator as a result of the judgment opening the bankruptcy proceedings.¹⁹² Here a distinction has to be made between the powers that deal with the relationship of the company's organs/actors and powers that affect the company's assets.¹⁹³

As an effect of the judgment opening bankruptcy proceedings the powers of the shareholders' meeting are limited.¹⁹⁴ In some specific situations a decision of the shareholders' meeting is needed, for example for an amendment of the articles of association, to reduce the nominal value of shares and to dismiss member(s) of the management board. The decisions of the shareholders' meeting can no longer affect and be detrimental towards the assets of the company in liquidation.¹⁹⁵ During bankruptcy proceedings when the shareholders' meeting appoints a director, the meeting cannot decide on a director's remuneration which affects the assets of the bankrupt company.¹⁹⁶ As a result bankruptcy's opening judgment, the bankrupt debtor loses the right to dispose and to administer his assets as far as they belong to the estate, these powers belong with effect from and including the day on which the bankruptcy order is rendered exclusively to the liquidator.¹⁹⁷

Therefore, although the shareholders' meeting retains its powers, most of the decisions will require the conformation or authorization of the administrator/liquidator (dependent on whether it is a bankruptcy or a

¹⁸⁸ Art. 2:107a Dutch Civil Code. See Asser 2-II 2009, nr. 319-321.

¹⁸⁹ Kortmann 1993, p. 146.

¹⁹⁰ Art. 228 DIA. Van der Heijden 1996, p. 69.

¹⁹¹ See also Kortmann 1993, p. 146.

¹⁹² Art. 23 and art. 68 DIA.

¹⁹³ Van der Heijden 1996, p. 77.

¹⁹⁴ Kortmann 1993, p. 146.

¹⁹⁵ Kortmann 1993, p. 109.

¹⁹⁶ Kortmann 1993, p. 146.

¹⁹⁷ Van der Heijden 1996, p. 77; Kortmann 1993, p. 107.

reorganization procedure). The liquidator in bankruptcy proceedings or the administrator suspension of payments proceedings cannot take decisions that belong exclusively to the corporate competences of the shareholders' meeting.¹⁹⁸

30. Does the shareholders' meeting need to approve the accounts of the distressed/insolvent company?

The management of a company shall prepare each year, within five months after the end of the financial year, the annual accounts and shall make them available for inspection by the shareholders at the office of the company.¹⁹⁹

In general it is the shareholders' meeting who needs to adopt the accounts of the company.²⁰⁰

Suspension of payments

The obligation to prepare annual accounts remains in place in suspension of payments proceedings. During suspension of payments the company continues to exist. The company does not have the power to perform any act of administration or disposition relating to its assets without the cooperation, authorisation or assistance of the administrator.²⁰¹ However, it is not clear whether approval is needed from the administrator for drawing up the annual accounts.²⁰² As the obligation to prepare the annual accounts remains in place and the corporate bodies retain their corporate powers, it is likely that the shareholders' meeting should adopt the annual accounts in suspension of payment.

Bankruptcy

It is uncertain whether the shareholders' meeting needs to adopt the accounts of the bankrupt company during bankruptcy proceedings. First of all, it is not clear whether the obligation to prepare the annual accounts remains in existence. Second, if it remains in existence who or which body is responsible for the preparation of the annual accounts? There are two views²⁰³:

1. The obligation to prepare the annual accounts remains with the liquidator or the management of the company;
2. The obligation to prepare the annual accounts no longer exists in bankruptcy proceedings.

The first view is that the obligation to prepare the annual accounts continues in bankruptcy proceedings. The liquidator has to comply with the accounting

¹⁹⁸ F.M.J. Verstijlen, *De faillissementscurator*, Ph.D. University of Groningen, W.E.J. Tjeenk Willink: Deventer 1998, p. 138. (Verstijlen 1998)

¹⁹⁹ Art. 2:101/210(1) Dutch Civil Code.

²⁰⁰ Art. 2:101/210(3) Dutch Civil Code.

²⁰¹ Art. 228 DIA.

²⁰² Kortmann 1993, p. 127.

²⁰³ See *Wessels Insolventierecht IV* 2010/4215.

obligation, including the obligation to prepare the annual accounts.²⁰⁴ According to this view the obligation to prepare the annual accounts lies with the liquidator, who is not a body of the company. It is in this case uncertain whether the shareholders' meeting needs to adopt the annual accounts.

Following the second view, the obligation to prepare the annual accounts no longer exists in bankruptcy proceedings. The liquidator must, however, comply with his duty to file public reports, including financial statements, concerning the bankruptcy proceedings. Under Dutch law the interests of other parties as well as creditors can be impaired when the liquidator has to prepare and publicize the annual accounts, as the associated costs would decrease the assets. Another reason could be that the management of the assets no longer rests with the bankrupt company.²⁰⁵ However the liquidator needs to give proper insight in the accounts of the company if he continues the business for a long time. In practice, often the period of continuation by the liquidator is very short. Furthermore, the accounts of a bankrupt company are often not in perfect order. Imposing an obligation to prepare the annual accounts on the liquidator practically means that the liquidator first needs to bring the accounts in line with the legal guidelines, which in most bankruptcies will not be cost-efficient.²⁰⁶ Following this opinion there is no obligation on the liquidator to prepare the annual accounts, it is reasonable to assume that the shareholders' meeting does not need to adopt the annual accounts of the bankrupt company.²⁰⁷

It seems to be more than probable that there is no obligation on the management of the company to prepare and publish the annual accounts over the year the company was declared bankrupt.²⁰⁸ The management was only empowered to decide on the assets of the company part of the year in which the company was declared bankrupt. However the obligation to prepare and publish annual accounts remains on the company for the previous years i.e. before the company became bankrupt.²⁰⁹ In this case the shareholders' meeting has to approve the annual accounts over these previous years.

31. Does the shareholders' meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders' meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

This question needs to be divided in two separate questions. First, does the shareholders' meeting have the power to dismiss directors who are still in charge

²⁰⁴ Art. 2:10 Dutch Civil Code. Verzijl 1998, p. 139-140.

²⁰⁵ W.C.L. van der Grinten, E.J.J. van der Heijden, *Handboek voor de naamloze en de besloten vennootschap*, Zwolle: W.E.J. Tjeenk Willink 1992, nr. 376. (Handbook Van der Grinten 1992)

²⁰⁶ B.J. de Jong & M.P. Nieuwe Weme, *Publicatie van de jaarrekening*, Deventer: Kluwer 2006, p. 38. (De Jong & Nieuwe Weme 2006)

²⁰⁷ Handbook Van der Grinten 1992, nr. 376.

²⁰⁸ J. Winter and J.B. Wezeman, *P. van Schilfgaarde. Van de BV en de NV*, Kluwer: Deventer 2013, nr. 112 and Kortmann 1993, p. 127.

²⁰⁹ De Jong & Nieuwe Weme 2006, p. 40.

of the company in suspension of payments/the bankrupt company? Second, does the shareholders' meeting have the power to request the removal of the administrator/liquidator?

1. Does the shareholders' meeting have the power to dismiss directors, if the directors are still in charge of the company in suspension of payments/the bankrupt company

Suspension of payments

During suspension of payments the competent authority to appoint directors also has the power to dismiss directors.²¹⁰ Generally it is the shareholders' meeting who has the authority to appoint and dismiss directors.²¹¹ However, in large companies (*structuurvennootschappen*), the supervisory board or the non-executive directors have the power to appoint or dismiss directors.²¹² In case of suspension of payments proceedings, the shareholders' meeting retains its corporate powers.²¹³ Therefore, the shareholders' meeting has the power to dismiss directors.

Bankruptcy

During bankruptcy proceedings the directors will be appointed by the corporate bodies which generally have the power to appoint a director outside bankruptcy proceedings.²¹⁴ The shareholders' meeting has the power to appoint directors (except for a large company, where this power is vested in the supervisory board or non-executive directors).²¹⁵

The directors can only be dismissed by the competent corporate body who has the power to appoint them. This power generally lies with the shareholders' meeting.²¹⁶ During bankruptcy proceedings the authority to appoint and dismiss directors remains with the shareholders' meeting (except for large companies, where this power is vested in the supervisory board or non-executive directors). The reason is that only the powers affecting the company's assets are transferred to the liquidator. The liquidator does not have the power to dismiss directors.²¹⁷

The liquidator has the power to terminate the employment contract of a director.²¹⁸ However, this does not affect the director's corporate relationship towards the company. The director can remain active, but does not have any claim for payment. When the corporate body dismisses the director, his

²¹⁰ Kortmann 1993, p. 137.

²¹¹ Art. 2:132/242 and art. 2:134/244 of the Dutch Civil Code.

²¹² Kortmann 1993, p. 136.

²¹³ Kortmann 1993, p. 114-115.

²¹⁴ Kortmann 1993, p. 136.

²¹⁵ Art. 132/242 Dutch Civil Code.

²¹⁶ Art. 134/244 Dutch Civil Code.

²¹⁷ Kortmann 1993, p. 136.

²¹⁸ Art. 40 DIA.

employment contract ends.²¹⁹

2. Does the shareholders' meeting have the power to request the removal of the administrator/liquidator

Suspension of payments

Only the administrator, other administrators and one or more creditors can request the removal of the administrator.²²⁰ The shareholders' meeting in suspension of payments proceedings does not have the power to request the removal of the administrator.²²¹

Bankruptcy

Only the district court has the power to dismiss the liquidator at any time after he has been heard or duly summoned to appear, and replace him by someone else or appoint one or more co-liquidators, in each case either on the recommendation of the magistrate (*rechter-commissaris*) or upon a reasoned request of one or more of the creditors, the creditors committee or the bankrupt debtor.²²² The shareholders' meeting does not have the power to dismiss the liquidator during bankruptcy proceedings.²²³

32. Is a shareholders' meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

A request regarding the commencement of bankruptcy proceedings may be filed by three different parties: the debtor, one or more of his creditors or the Public Prosecutor for reasons of public interest.²²⁴ If the latter two file the request, the shareholders' meeting is not involved in the process of filing at all.

The board, as the body representing the NV²²⁵ or BV,²²⁶ can file for bankruptcy on behalf of the company (debtor). In principle, a mandate from the shareholders' meeting is required for the board to be authorized to file for bankruptcy of the company.²²⁷ It is argued that given the requirement of its mandate, the shareholders' meeting has an autonomous power to decide on bankruptcy and

²¹⁹ See Netherlands Supreme Court 15 April 2005, JOR 2005/144 (*Bartelink/Ciris*); Kortmann 1993, p. 136; Handbook Van der Grinten 1992, nr. 376.

²²⁰ Art. 224 DIA.

²²¹ Tekst & Commentaar Groene Serie Faillissementswet, commentary art. 224 DIA.

²²² Art. 73 DIA. Tekst & Commentaar Groene Serie Faillissementswet, commentary at art. 73 DIA; *Wessels Insolventierecht IV* 2010/4120 et seq.

²²³ Kortmann 1993, p. 148.

²²⁴ Art. 1 DIA.

²²⁵ Art. 2:130 Dutch Civil Code.

²²⁶ Art. 2:240 Dutch Civil Code.

²²⁷ Art. 2:136/2:246 Dutch Civil Code.

the board only functions as the executing body.²²⁸

However, the articles of association can provide that such mandate from the company's shareholders is not required.²²⁹ The result of an exception based on this provision differs whether an NV or BV is concerned. If the articles of association of an NV make use of this provision and delegate the competency to decide on filing for bankruptcy to the board, it is still required to ask the shareholders' meeting for *approval* of its decision nonetheless. Decisions of the board concerning an important change in the identity of the legal entity/company are subject to approval of the shareholders' meeting.²³⁰ Filing for bankruptcy is considered a decision concerning such an important change.²³¹ As mentioned, the result of an exception in case of a BV differs. The rules concerning the BV lack a provision similar to art. 2:107a Dutch Civil Code. A deviation in the articles of association from the general rule given in art. 2:246 Dutch Civil Code fully sidelines the shareholders' meeting when the board decides to file for bankruptcy.

Dutch corporate law in general provides a differing set of rules for large companies. If a large company is concerned,²³² the boards' resolution to file for bankruptcy needs to be *approved* by the supervisory board²³³ or the majority of the non executive board members, if it concerns a one tier board.²³⁴ This rule however does not put the need for approval by the shareholders' meeting ex art. 2:136/2:246 Dutch Civil Code out of action.²³⁵

Suspension of payments proceedings can only be commenced following a petition filed by the debtor.²³⁶ In case of an NV or BV, the petition has to be filed by the board. Contrary to a petition for bankruptcy proceedings, no mandate from the general meeting is needed.²³⁷ Art. 2:107a Dutch Civil Code does not apply to the request for suspension of payments for a NV.²³⁸

If a large company is concerned²³⁹ the board however will need the approval of the supervisory board or the majority of non-executive board members to request suspension of payment.²⁴⁰

²²⁸ Handbook Van der Grinten 1992, nr. 243; *Wessels Insolventierecht IV* 2010/4210 et seq.

²²⁹ Art. 2:136/2:246 Dutch Civil Code. See *Wessels Insolventierecht I* 2012/1227a.

²³⁰ Art. 2:107a Dutch Civil Code.

²³¹ *Kamerstukken I* 2003/04, 28 179, B, p. 9.

²³² Art. 2:153/2:263 Dutch Civil Code.

²³³ Art. 2:164(1)(i)/2:274(1)(i) Dutch Civil Code.

²³⁴ Art. 2:164a(4) jo. 2:164(1)(i)/2:274a(4) jo. 2:274(1)(i) Dutch Civil Code.

²³⁵ Asser 2-II 2009, nr. 391.

²³⁶ Art. 214 DIA.

²³⁷ *Wessels Insolventierecht VIII* 2011/8022 et seq.

²³⁸ *Kamerstukken I* 2003/04, 28 179, B, p. 9.

²³⁹ Art. 2:153/2:263 Dutch Civil Code.

²⁴⁰ Art. 2:164(1)(i)/ 2:274(1)(i) Dutch Civil Code.

33. Does the shareholders' meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

The debtor in suspension of payments or the bankrupt is allowed to offer its ordinary creditors a composition scheme (*akkoord*), usually consisting of the partial payment of the creditors' claims against the full and final settlement of their claims.²⁴¹ However, the substance of a composition scheme can differ, as the law is silent on that matter. If the scheme is approved by a simple majority of the creditors and sanctioned by the District Court, all ordinary creditors are bound by it;²⁴² the latter in contrast to an out-of-court work out (see the response to question 3). As a consequence, the suspension of payments or bankruptcy proceedings terminate.²⁴³

The Dutch Insolvency Act does not provide for either the preferential creditors or the secured creditors to be part of the scheme. Furthermore, the rights of shareholders cannot be varied through the composition scheme.²⁴⁴

With regard to the first question, a distinction should be drawn between (1) the approval, (2) the offer to the creditors, (3) the decision to approve the scheme and (4) the implementation of composition scheme.²⁴⁵

(1) A composition scheme is approved solely with the votes of the ordinary creditors.^{246,247} No shareholders' meeting is required.

(2) However, articles 138 and 252 DIA indicate that only the debtor is in the position to offer a composition scheme. If the debtor is a legal person, the board of directors or a single director, representing the company, are competent to offer a scheme to the creditors.²⁴⁸

(3) In principle, the decision of the directors to offer a composition scheme does not need the shareholders' meeting consent, since a scheme is an agreement among the creditors by which shareholders' rights are not influenced. As shareholders are not involved, they do not have a say in the decision to offer a composition scheme.

However, Dutch company law states that – in a public company (*naamloze vennootschap*) – shareholders' meeting authorization could be required if the composition scheme relates to an important change in the identity or character of the company.^{249,250} As a consequence, this rule does not apply to almost all composition schemes, since most composition schemes do not consist of such an important change of the legal entity's structure. Nevertheless, if the

²⁴¹ Art. 138 DIA (bankruptcy) and art. 252 DIA (suspension of payments).

²⁴² Art. 157 DIA (bankruptcy) and art. 273 DIA (suspension of payments).

²⁴³ Art. 161 DIA (bankruptcy) and art. 276 DIA (suspension of payments).

²⁴⁴ K. Harmsen & M.W. Josephus Jitta, *The insolvency laws of the Netherlands*, 2006, p. 66-76.

²⁴⁵ Cf. Van der Heijden 1996, p. 176.

²⁴⁶ Art. 145 DIA (bankruptcy) and art. 268 DIA (suspension of payments).

²⁴⁷ Cf. A.D.W. Soedira, *Het akkoord*, Ph.D. Nijmegen, Deventer: Kluwer 2011, p. 141. (Soedira 2011)

²⁴⁸ See Soedira 2011, p. 113; Van der Heijden 1996, p. 176.

²⁴⁹ Art. 2:107a Dutch Civil Code.

²⁵⁰ Cf. Kortmann 1993, p. 146, who states that all powers of the shareholders' meeting remain intact during bankruptcy or suspension of payments.

aforementioned rule does apply, it is permitted to ask for authorization afterwards in case of an emergency situation (being in bankruptcy or suspension of payments proceedings qualifies as such).²⁵¹ Therefore, the shareholders' meeting approval will not be an obstacle with regard to the offer of a composition scheme.

Anyhow, according to company law the shareholders' meeting may decide to remove the directors if it disagrees on the decision to offer a composition scheme.²⁵²

(4) The shareholders' meeting needs to adopt the necessary resolutions to implement the structural changes that follow from the composition scheme. See the response to question 35, where this 38atteri s dealt with.

With regard to the second question, it should be mentioned that neither the shareholders' meeting nor an individual shareholder can challenge a composition scheme. Only the creditors are permitted to deliver their comments to the District Court that decides over the approval (*homologatie*) of the composition scheme in question.²⁵³ Furthermore, solely the creditors can lodge an appeal against the District Court's decision. In addition, also the bankrupt or the debtor (i.e. the board of directors) is allowed to file an appeal, but only if the court refused to approve the composition scheme.²⁵⁴

The Insolvency Act provides a facility to influence decisions and acts of the liquidator during a bankruptcy procedure. Whilst in this procedure, each of the bankruptcy creditors, the committee of creditors appointed from their midst and the bankrupt debtor himself have the right to lodge a petition to object against every specific act of the liquidator or to instigate that the supervisory judge (*rechter-commissaris*) orders the liquidator to perform or refrain from performing any contemplated act.²⁵⁵ Shareholders do not pertain to the group this list provides. Since this list is exhaustive, the shareholders' meeting is not allowed to invoke this right.²⁵⁶ However, it should be noted that the articles of association can give the shareholders' meeting of a private company the right to give specific instructions to the board.²⁵⁷ This power could therefore be used to indirectly challenge the liquidator's acts and decisions via the board that represents the bankrupt company. In a public company, the right to give instructions can only apply to the general lines of the company's policy in areas that are specified in the articles.²⁵⁸ Specific decisions and acts of the liquidator can therefore not be challenged indirectly in this way in a public company. Another means of indirect influence is the shareholder meeting's power to dismiss directors (see question 29) who are unwilling to lodge a petition, and appoint new ones who will.

²⁵¹ Asser 2-II 2009, nr. 323.

²⁵² Cf. Kortmann 1993, p. 147.

²⁵³ Art. 151 DIA (bankruptcy) and art. 269b(4) DIA (suspension of payments).

²⁵⁴ Art. 154 DIA (bankruptcy) and art. 272(5) DIA (suspension of payments).

²⁵⁵ Art. 69(1) DIA.

²⁵⁶ See R. Bremer, 'Schikkingsperikelen tijdens faillissement', *TvI* 2007/17.

²⁵⁷ Art. 2:239(4) jo. art. 2:189a Dutch Civil Code.

²⁵⁸ Art. 2:129(4) jo. art. 2:78a Dutch Civil Code. There is some discussion about the scope of this provision.

34. Is a shareholders' meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

A distinction has to be made between (1) the power to decide on a new share issue and (2) the competence to place the issued shares. Whilst the first is considered a power of company law and thus remains with the competent body during bankruptcy, the latter power is considered to be a proprietary legal act concerning the estate. Only the liquidator or the company together with the administrator (during suspension of payments) are entitled to affect the estate during insolvency proceedings.

Concerning the first point: a decision of the shareholders' meeting is required for an NV or BV to issue shares after its incorporation, unless the articles of association or the shareholders' meeting itself appoints a different body of the legal entity to decide.²⁵⁹ If this exception is used, the board will generally be the appointed body. The power to decide on a new share issue remains with the competent body during bankruptcy, because it is not considered a property right that is included in estate.²⁶⁰ Therefore, the answer as to whose decision is required to issue new shares during bankruptcy proceedings depends on whether or not an exception (in the articles or by decision of the shareholders' meeting) has been made to the general rule that the shareholders' meeting is competent to decide on the issuance. The liquidator however cannot be considered a body of the legal entity, according to the Dutch Civil Code.²⁶¹ Consequently he cannot be appointed by the articles or the shareholders' meeting.

The liquidator however is competent to place the shares after the competent body has decided on the issuance. This competence stems from his power to decide on the estate, as the placing of shares is considered a proprietary legal act.²⁶²

A somewhat similar structure applies to a suspension of payments. The power to decide a new share issue remains with the competent body, whilst the placement of the shares by the board requires the *cooperation* of the administrator.²⁶³

For a conversion of claims into new shares (a debt for equity swap), a new share issue is required. As discussed above, the power to decide on a new share issue is vested in the shareholders' meeting, except if the competence is delegated. The intention to swap debt for equity does not influence the procedure for a new share issue. Unless the power to decide on an issuance has been delegated to a different corporate body, a shareholders decision is needed to swap debt for equity.

²⁵⁹ Art. 2:96(1)/2:206(1) Dutch Civil Code.

²⁶⁰ Van der Heijden 1996, p. 105.

²⁶¹ Art. 2:78a jo. 2:96(1)/2:198a jo. 2:206(1) Dutch Civil Code provide an exhaustive list of bodies to which the competence to decide a new share issue can be appointed to. The liquidator is not included on this list.

²⁶² Van der Heijden 1996, p. 106.

²⁶³ Van der Heijden 1996, p. 106.

Another difficulty that arises with a debt for equity swap is that shareholders usually also have an *individual* pre-emptive right to new shares in proportion to the value of the shares held by them.²⁶⁴ In case of a public company, this pre-emption right is mandatory and can only be bypassed by a decision of the shareholders' meeting or by the body appointed to decide on the issuance.²⁶⁵ In case of a private company, a pre-emption right is the statutory default, but the articles can exclude it. Moreover, the shareholders' meeting can limit or exclude the pre-emption right, for each issuance (unless the articles determine otherwise).²⁶⁶ Therefore, the approval of the shareholders' meeting is required in most situations to successfully convert claims into new shares.

Because only unsecured creditors are bound by a compulsory composition,²⁶⁷ such a measure will not result in a different answer. Worth mentioning is that the Enterprise Chamber of the Amsterdam Court of Appeal has surpassed shareholders' rights on different occasions. See the answer to question 6 for a more detailed description.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders' meeting authorization required for this?

A composition scheme may affect the structure of the corporate entity, since the law is (almost) silent on the scheme's substance.²⁶⁸ There is no doubt that a composition scheme can include a merger, a spin-off or even a change of the legal form. If it does, the regular procedures should be followed, since the implementation of a scheme is without prejudice to regular company law.

This implies, firstly, that the shareholders' meeting needs to adopt the necessary resolutions to implement the structural changes that follow from the composition scheme. This can be derived from the fact that all shareholders' meeting powers remain in bankruptcy or suspension of payments.

The articles of association will have to be amended; this needs the shareholders' meeting approval.²⁶⁹ Furthermore, it is necessary to follow the prescribed procedure for each of the structural changes.²⁷⁰ Most procedures demand a shareholders' meeting approval. For instance, art. 2:317(1) Dutch Civil Code states that such an approval is necessary to implement some particular type of merger.²⁷¹ An approval is also needed in order to change the corporate entity's legal form.²⁷²

²⁶⁴ Art. 2:96a(1)/2:206a(1) Dutch Civil Code.

²⁶⁵ Art. 2:96a(6) Dutch Civil Code.

²⁶⁶ Art. 2:206a(1) Dutch Civil Code.

²⁶⁷ Bankruptcy: art. 157 DIA, suspension of payments: art. 273 DIA.

²⁶⁸ Van der Heijden 1996, p. 177.

²⁶⁹ Art. 2:121 and art. 2:127 Dutch Civil Code (public company) and art. 2:231 and art. 2:237 Dutch Civil Code (public company). See also Kortmann 1993, p. 149.

²⁷⁰ Van der Heijden 1996, p. 177.

²⁷¹ This only applies to a so-called 'legal merger' (*juridische fusie*).

²⁷² Art. 2:18(2) Dutch Civil Code.

Secondly, shareholders' meeting authorization is required if the structural changes relate to an important change in the identity or character of the company or the undertaking.²⁷³ See the response to question 33, section 3.

Besides, it should be mentioned that the abovementioned structural changes (i.e. merger, spin-off, change of legal entity) can also take place beyond a composition scheme. A composition scheme is therefore not needed to conduct structural changes.

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders' meeting authorisation required?

During bankruptcy proceedings the liquidator can carry on business if the commission of creditors authorizes him to do so. However, a commission of creditors is hardly ever appointed. If there is no commission, authorization of the supervisory judge (*rechter-commissaris*) is needed.²⁷⁴ Continuation of business during a bankruptcy proceedings is justified if this serves the interest of the assets of the company.²⁷⁵

During a suspension of payments proceedings, the *debtor* (company) itself carries on the business.²⁷⁶ According to the explanatory memorandum to the DIA, continuation of the business is one of the main goals of the suspension of payments proceeding.²⁷⁷ The debtor's actions, however, are limited by the provision that he is not authorized to perform acts of administration and disposition concerning the company's assets without the cooperation, authorization or assistance of the administrator.²⁷⁸ The debtor can cease business by filing for bankruptcy.

In neither one of the insolvency proceedings, authorisation of the shareholders' meeting is required.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders' meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In suspension of payments proceedings, assets can be sold by the debtor, but only

²⁷³ Art. 2:107a Dutch Civil Code.

²⁷⁴ Art. 98 DIA.

²⁷⁵ M. Polak, *Faillissement en surseance van betaling*, Groningen: H.D. Tjeenk Willink 1972, p. 240; S.H. de Ranitz, 'De voortzetting van de onderneming tijdens insolventie, nu en straks', in: N.E.D. Faber et al., *De bewindvoerder, een octopus*, Zwolle: Tjeenk Willink 2008, p. 182. (De Ranitz 2008)

²⁷⁶ De Ranitz 2008, p. 181.

²⁷⁷ Wessels Insolventierecht VIII 2014/8002 et seq.

²⁷⁸ Art. 228 DIA.

with the administrator's consent.²⁷⁹ In principle, no shareholders' meeting authorization is required to sell corporate assets, except – in case of a public company – to a sale which relates to an important change in the identity or character of the company or the undertaking.²⁸⁰ An important change exists, anyhow, in case of a transfer of the entire undertaking or virtually the entire undertaking to a third party.²⁸¹ Nevertheless, as mentioned before (see the response to question 33, section 3), authorization can be given afterwards.

In bankruptcy proceedings, the liquidator is authorized to sell all the assets.²⁸² No shareholders' meeting authorization is required.

Usually, the liquidator sells the assets shortly after the commencement of the bankruptcy proceedings, which practice was sanctioned by the Supreme Court of the Netherlands.²⁸³ According to its judgement, it is even allowed to sell the entire business operation shortly after the bankruptcy proceedings commenced.²⁸⁴

The liquidator's authorization to sell the assets is without prejudice to the competences of the secured creditors, since the bankruptcy proceedings do not affect their right of pledge or right of mortgage.²⁸⁵ This means that the liquidator cannot sell assets if these assets are pledged or mortgaged. This rule does not apply, however, if the secured creditors were given a reasonable period of time by the liquidator to sell the pledged or mortgaged assets, and this period of time is exceeded without the assets being sold by the creditors.²⁸⁶

As mentioned in the introductory remarks, the Dutch government has recently taken the initiative to provide a legal basis for the so called 'pre-pack sale' (*Wet Continuïteit Ondernemingen I*), an instrument that has been developed in practice on the basis of the English pre-pack administration. In brief, this practice and the legislative proposal entail that the court may indicate which insolvency practitioner will be appointed if bankruptcy proceedings will be opened, enabling this prospective liquidator to monitor negotiations on the sale of the debtor company's business (or parts thereof) as a going concern, which pre-negotiated sale may then take place directly after the commencement of the bankruptcy proceedings. This should mitigate the negative effects that appear when the commencement of bankruptcy proceedings is made public, so that the proceeds of the sale are increased as well as the likelihood of a company's restart.

²⁷⁹ Art. 228 DIA.

²⁸⁰ Art. 2:107a Dutch Civil Code.

²⁸¹ Art. 2:107a(1) sub a, Dutch Civil Code.

²⁸² Art. 101 and art. 175(1) DIA.

²⁸³ Netherlands Supreme Court 27 August 1937, *NJ* 1938/9.

²⁸⁴ *Cf. Wessels Insolventierecht IV* 2010/4392.

²⁸⁵ Art. 57(1) DIA.

²⁸⁶ Art. 58(1) DIA.

38. Does the shareholders' meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

The liquidator has the right during bankruptcy proceedings to decide on the continuation or rejection of any contract dating from before the liquidation order. It is likewise his choice whether or not to enter into new contracts during the proceedings.²⁸⁷

The DIA only provides one method to influence the liquidators' behavior during a Bankruptcy (see the response to question 33).²⁸⁸ The shareholders' meeting does not pertain to the group of stakeholders mentioned in this article. Therefore, the shareholders' meeting cannot make use of this provision to directly influence a decision of the liquidator. However, in a private company the articles can confer to the shareholders' meeting a right to give specific instructions to the board, which could be used to influence the liquidator's decisions indirectly (see question 33).

During a suspension of payments proceedings, the board is obliged to act together with the company's administrator(s) to perform acts of administration and disposition concerning the company's assets.²⁸⁹ There are no specific provisions to influence decisions of an administrator during a suspension of payments proceedings.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders' meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings' decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

In principle, the assets of each corporate entity should be liquidated separately. Only if this is impossible (in case the assets of different entities are inseparably mixed), some courts allow for a consolidated liquidation, although this measure is not foreseen in the DIA. See the response to question 40. It should be emphasized that a consolidated liquidation is extremely rare (despite the possibility of procedural consolidation, as described in the response to question 40).

It seems that, in the very rare cases that such substantive consolidation is allowed, a composition scheme could be presented for a whole corporate

²⁸⁷ R.J. Verschoof, 'Het toezicht van de rechter-commissaris, in het bijzonder op overeenkomsten', in: *Overeenkomsten en Insolventie*, Deventer: Kluwer 2012, p. 29-30; T.T. van Zanten, 'Het recht van de curator op wanprestatie', *TvI* 2007/9, p. 40.

²⁸⁸ Art. 69 DIA.

²⁸⁹ Art. 228 DIA.

group.²⁹⁰ This implies that all creditors cast their votes together, even though they are creditors of different legal entities. This is nevertheless uncertain, as the law is silent on this matter.

As stated in response to question 33, no shareholders' meeting authorization is required for the approval of a composition scheme as such. However, such an authorization is required to offer a composition scheme which would result in an important change in the identity or character of the company or the undertaking (see the response to question 33, section 3).²⁹¹

Furthermore, shareholders' meeting authorization is required to implement structural changes which follow from the composition scheme (e.g. merger, spin-off, change of legal form). See the response to question 35. In these cases, it seems that the shareholders' meeting of each corporate entity should give its approval separately. Since the law is silent on the coordination of these decisions, problems may arise if one shareholders' meeting does not give its consent. This will preclude the implementation of the structural change.

Moreover, no specific safeguards for minority shareholders exist. The implementation of some structural changes, however, requires a qualified majority of shareholders. For instance, a merger requires the consent of a two-thirds majority.²⁹²

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders' meetings of the relevant companies involved in the coordination mechanisms, if any?

Dutch insolvency law is focused on separate (legal) persons and (liquidation of) their separate assets.²⁹³ The DIA does not provide requirements or mechanisms for coordination in insolvency proceedings of companies belonging to the same group.

The Dutch insolvency practice accepts exceptions to this rule when individual liquidation meets large objections. Even though neither case law, nor any act provides a basis for this practice, *procedural consolidation* often is used to provide for coordination of multiple proceedings of companies belonging to the same group. When used, the same person is appointed liquidator in the different bankruptcy proceedings of companies belonging to the same group.²⁹⁴

²⁹⁰ Cf. P. van Schilfgaarde, 'Het geconsolideerde faillissement', in: S.C.J.J. Kortmann et al. (eds.), *De curator, een octopus* (Serie Onderneming & Recht 6), Zwolle: Tjeenk Willink 1996, p. 33; M.L.H. Reumers, *Samengevoegde afwikkeling van faillissementen*, Ph.D. Erasmus University Rotterdam, Deventer: Kluwer 2007, p. 377. (Reumers 2007)

²⁹¹ Art. 2:107a Dutch Civil Code.

²⁹² Art. 2:330(1) Dutch Civil Code.

²⁹³ Reumers 2007, p. 2.

²⁹⁴ R.J. van Galen, 'Consolidatie van insolventieprocedures', in: N.E.D. Faber et al., *De bewindvoerder, een octopus*, Zwolle: Tjeenk Willink 2008, p. 158.

The best practice rules of the Dutch Association for Insolvency Lawyers (INSOLAD) provide that liquidators can consolidate bankruptcies in exceptional cases, after being granted permission by the supervisory judge (*rechter-commissaris*).²⁹⁵

The degree of consolidation will differ according to the case. A light form of consolidation could include a consolidation of the insolvency costs and debts of the insolvency assets (e.g. the liquidator's salary), instead of exact imputation of the costs and debts per bankruptcy. An example of a heavier form of consolidation is given in the *Zilfa* ruling of the Dutch Supreme Court.²⁹⁶ The Supreme Court decided that *if* it is impossible to separate the assets and liabilities of two bankrupt legal entities, the asset of both entities can be liquidated as one merged bankruptcy. The active as well as the passive of the involved companies are merged and as a result the creditors of both the bankrupt companies can recoup on the merged active. If such consolidated bankruptcy proceedings takes place, the creditors of both companies meet in a joint first meeting of creditors, in contrast to the customary separate first meetings of creditors. Intercompany claims as a rule become extinguished as a result of consolidated liquidation.²⁹⁷

The shareholders' meetings are not involved in the aforementioned coordination mechanisms.

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.

Works Council Act

Under Dutch law, an employer (*ondernemer*) cannot take certain decisions regarding to the company without advice or permission of the company's works council (*ondernemingsraad*).²⁹⁸ Since the liquidator is to be considered as the employer during a bankruptcy procedure, the liquidator needs to ask advice or permission as well.²⁹⁹ The same applies in respect of an administrator in a suspension of payments procedure. According to art. 25 of the Works Council Act, advice should be asked before a decision is taken to – among other things – transfer the company or end its activities. The intention to file for the opening of suspension of payments proceedings is, however, not subject of the works council's advisory powers.³⁰⁰ Whether these advisory powers indeed exist in case a company files for the opening of bankruptcy proceedings is debated in

²⁹⁵ INSOLAD, *Praktijkregels voor curatoren september 2011*, art. 9.2.

²⁹⁶ Netherlands Supreme Court 25 September 1987, NJ 1988/136.

²⁹⁷ M.W. Josephus Jitta, 'Gedachten omtrent de geconsolideerde afwikkeling van faillissementen', in: S.C.J.J. Kortmann et al., *Privaatrecht in de herijking van het faillissementsrecht. 21 eeuw*, Deventer: Kluwer 1999, p. 104; J.W. Winter, 'Vennootschapsrecht en moderne technologie', in: R.E. van Esch et. al., *Preadvies van de Vereniging 'Handelsrecht'*, Deventer: W.E.J. Tjeenk Willink 2001, p. 121.

²⁹⁸ Generally, this applies to companies with at least 100 employees (art. 2, section 1, of the Works Council Act).

²⁹⁹ Kortmann 1993, p. 151-152.

³⁰⁰ Netherlands Supreme Court 6 June 2001, *JOR 2001/146*.

literature.³⁰¹ According to art. 27 of the Works Council Act, permission should be given by the Works Council with regard to a decision to change pay and employee benefits. Both articles may delay an insolvency procedure.

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³⁰¹ *Wessels Insolventierecht I* 2012/1230 et seq.